Supreme Court, U.S.
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No. 93 -

In The
Supreme Court of the United States
October Term, 1993

JOHN E. FILIOS, ET AL.

PETITIONERS

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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QUESTION PRESENTED

Does the Commonwealth of Massachusetts's policy of requiring federal military retirees to pay state income tax on their military retirement benefits while it completely exempts from state tax the retirement benefits of state and municipal retirees violate 4 U.S.C. §111 which prohibits states from taxing federal employees in a discriminatory fashion?

LIST OF PARTIES

The parties to the proceeding below were the petitioners, who are federal military retirees and their spouses: John E. Filios, Eleanor G. Filios, Herbert L. Cheeseman, Betty B. Cheeseman, Ralph Cipolla, Doris H. Cipolla, Joseph M. Conroy, Robert C. Davenport, Annetta B. Davenport, Kenneth R. Depperman, Mary E. Depperman, Charles F. DeSmet, Marjorie I. DeSmet, Francis H. Fumia, Dreama F. Fumia, Mack K. Greenberg, Harriet C. Greenberg, Daniel F. Hayes, Dorothy R. Hayes, David J. Mainville, Vern Mainville, Donald G. Smith, Ruth E. Smith, Richard J. Spatafora, Liliane M.J. Spatafora, Russell E. Tracy, and Lillian A. Tracy. The respondent before the Court is the Commissioner of Revenue of the Commonwealth of Massachusetts.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners John E. Filios et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in the above-titled case on July 13, 1993, as amended by that Court on October 26, 1993.

OPINION BELOW

The opinion of the Supreme Judicial Court is reported at 415 Mass. 806 (1993) and is reprinted in the Appendix hereto, p. A. 44-51, infra. The decision of the Court was amended by the Court on October 26, 1993. A. 52.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Supreme Judicial Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTE INVOLVED

This case involves 4 U.S.C. § 111 which provides, in material part, as follows:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

STATEMENT OF THE CASE

Preliminary Statement

This case involves fourteen veterans[1] who have been required to pay state income tax on their military retirement benefits. It raises one issue: is it lawful under federal law for the Commonwealth of Massachusetts to compel retired military personnel to pay a state income tax on their retirement benefits when the state permits retired state and municipal workers to escape paying any such tax on their benefits?

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1. Originally 14 veterans' cases (involving a total of 27 taxpayers) were consolidated and decided by the Massachusetts Appellate Tax Board. A. 7-8. The veterans filed a single appeal. A. 45, n. 2. The Supreme Judicial Court determined as a matter of state procedure that 13 appeals were not properly before it. Id. However, on October 26, 1993, that court reconsidered and amended its judgment in order to allow all 27 taxpayers to seek review in this Court. A. 52. The same issue is raised in all 14 cases.

Federal law, codified in 4 U.S.C. § 111 and derived from the constitutional principle of intergovernmental tax immunity, prohibits states from tax discrimination against federal employees. Since retirement benefits for both federal veterans and state and local employees are derived from funds never subject to federal income tax, the two systems are essentially identical. Thus, Massachusetts' favoritism to its own retirees is illegal.

Several recent decisions of this Court have relied on section 111 to strike down state efforts to tax federal employees while protecting their own workers. Massachusetts' actions here not only flout the clear tenor of those decisions but also, if allowed to stand, open a door which other states can use to bypass the equal treatment command of section 111.

Statement of Facts and Prior Proceedings

The facts in this case are simple and undisputed.[2] The 14 veterans who ask this Court to hear their case are residents of the Commonwealth who received income from military retirement benefits between 1985 to 1988 ("the veterans"). A. 3. They paid Massachusetts income tax on that income and filed timely abatement applications with the Commissioner of Revenue ("Commissioner") which were denied. A. 45. They appealed to the Appellate Tax Board ("Board"). Id.

On October 8, 1991, the Board ruled in the Commissioner's favor. A. 1. The veterans sought reconsideration in light of the intervening decision in Barker v. Kansas, __ U.S. __, 118 L. Ed. 2d 243 (1992). On July 1, 1992, the Board denied reconsideration and issued its Findings of Fact and Report. A. 2-43.

The veterans filed a timely appeal to the Massachusetts

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2. The discussion of facts in this petition will be based on the Appellate Tax Board's decision below, A. 2-43, and on the Supreme Judicial Court's opinion. A. 44-51.

Appeals Court pursuant to Mass. G.L. c. 58A, §13. A. 45. On October 2, 1992, the Supreme Judicial Court allowed the veterans' application for Direct Appellate Review. Id. That court issued a decision against the veterans on July 13, 1993. A. 44-51. On October 26, the Court amended its judgment to reflect that all 14 veterans, and the 13 spouses were properly parties to the appeal. A. 52; see A. 45, n.2.

SUMMARY OF ARGUMENT

In the past four years this Court has held that federal law, derived from basic constitutional principles of federalism, bars states from using their tax systems to favor their employees or retirees over federal workers or retirees. Yet the Supreme Judicial Court of Massachusetts has upheld a policy which requires retired military personnel to pay state income tax on their retirement benefits while exempting all of its own state and local retirees from that tax. If that policy is allowed to stand, Massachusetts will have shown other states a clear path to circumvent this Court's decisions and federal law.

As discussed below, three separate lines of argument show that Massachusetts is illegally taxing retired federal military personnel. First, as the Supreme Judicial Court recognized, state laws still exist which expressly exempt state and local retirees, and only them, from tax on their pensions. This facial statutory discrimination violates federal law. Massachusetts' defense, that petitioners did not show how many state and local retirees are benefitting from this discrimination, not only seeks to shift the state's burden onto petitioners, but it directly conflicts with this Court's precedents in other areas where it has considered claims of illegal state tax favoritism.

Second, the state's primary argument, that the state and federal military retirement systems are distinguishable because the first is "contributory" while the second is not, fails because under Massachusetts' own laws 90% of state retirement benefits are paid from "pension" funds which are expressly not "contributory." The

state court allowed Massachusetts to shield a totally non-contributory pension system behind the veil, and a thin one at that, of a contributory annuity system. Unless checked by this Court, this ruse can and will be adopted by other states which seek to provide favored tax treatment to their employees.

Finally, even accepting Massachusetts' effort to fuse its pension and annuity benefits into one system, that system is not sufficiently "different" to warrant exempting its benefits from all taxation while still taxing federal military pensions. The state's self-serving decision to let its employees avoid paying federal income tax on their "contributions" converts the state system into one which, whatever it may be called, is effectively indistinguishable from the military system. Exempting state benefits while taxing federal benefits is therefore illegal discrimination.

REASONS FOR GRANTING THE WRIT

I. 4 U.S.C. § 111 PROHIBITS TAXING MILITARY RETIREES' RETIREMENT BENEFITS WHEN STATE AND MUNICIPAL RETIREMENT BENEFITS ARE NOT TAXED.

A. Davis, Barker, and the Requirement that the State Must Demonstrate Significant Differences.

This case involves the legality of Massachusetts' policy of taxing the retirement benefits of retired federal military personnel while exempting from tax retirement benefits received by retired state and municipal employees. The key question is whether this discrimination violates the terms established by Congress when it decided to give the states any authority to tax federal employees.

The Congressional decision to partially cede the federal government's sovereign constitutional immunity from state taxation of its employees, see, e.g. M'Culloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819), was made on the condition that such taxation had

to be equitable, that is, states could not tax federal employees more onerously than they taxed their own employees. See Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989). This rule is set out in 4 U.S.C. § 111 which provides that the United States consents to taxation of its officers' and employees' pay and compensation ". . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

This principle has been developed in two recent cases in which this Court struck down state efforts to discriminate in favor their retirees. See Davis v. Michigan, 489 U.S. 803 (1989); Barker v. Kansas, 503 U.S. ___, 118 L.Ed.2d 243 (1992). In Davis the Court held that the non-discrimination clause of section 111 applies to retirement benefits paid to retired federal employees and that individual retirees could sue to obtain the protection of that clause. 489 U.S. supra at 808-810, 814-15. The Court rejected Michigan's argument that the allegedly more generous benefits federal retirees receive was a "significant difference" that justified discrimination between state and federal employees. It found that the state's argument that federal employees receive more generous retirement benefits than state employees, even if true, did not warrant a "blanket exemption" for state retirement benefits which favored state employees over federal workers. Id. at 817. As Justice Kennedy wrote:

> The danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it. . . . Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar.

489 U.S. at 815, n.4

In Barker, the Court restated its Davis holding that, in

applying the nondiscrimination clause of section 111, the appropriate inquiry is "whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes." 118 L. Ed. 2d at 249 (citation omitted)(emphasis supplied). The Court concluded that military retirees are entitled to the protection of section 111 and reversed a decision by the Kansas Supreme Court that there were significant differences between federal military and state civilian retirees. Id. at 254.[3]

Both Davis and Barker focus solely on differences in the way the state treats federal and state retirees. "As the law stands, a tax that favors state and local retirees over federal retirees violates [inter]governmental immunity even if the latter are treated no differently than private retirees." A. 32 (Appellate Tax Board). As shown below Massachusetts' tax laws, both facially and as applied, favor state and municipal retirees and that favoritism is not justified by any "significant difference" between the two groups.

B. The Statutory Tax Exemption for State But Not Federal Retirement Benefits Violates 4 U.S.C. §111.

The bulk of the decision below rests upon the conclusion that the relevant distinction in Massachusetts law is not between federal and state employees but between "contributory" and "non-contributory" pension systems. A. 47. But the validity of that distinction need not be addressed, because Massachusetts' law still reflects a long-standing, explicit state policy of absolutely exempting certain state and local pensions from tax.

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3. In Barker the Court noted that while the Kansas Supreme Court had observed that state retirees contribute to their retirement funds while military retirees do not, it did not base its holding of a "significant difference" on that point. Id. at 254, n. 5. The contributory/non-contributory issue thus was not decided in Barker.

From the enactment of the first Massachusetts income tax in 1917, the state exempted pensions received by Boston school teachers and municipal police and fire personnel. A. 49, citing Sp. St. 1917, c. 327; St. 1917, c. 270. In 1973 the state Legislature provided that "[n]otwithstanding any general or special law to the contrary, income from a noncontributory annuity or pension allowance . . . shall be exempt from taxation under [the income tax.]" A. 49, citing St. 1973, c. 876, §1. This law continues in effect. A. 35.[4] These exemptions, reinforced by the Legislature in 1973, demonstrate that, on its face, Massachusetts law favors some public retirees over federal retirees, exactly the situation prohibited by federal law. See Davis, 489 U.S. supra at 815, n.4.

The Supreme Judicial Court's response to this showing of favoritism was to change the relevant test and shift the burden from the state to the veterans.[5] It accepted the Board's ruling that the state's laws "taken together do not deny to federal employees generally any favorable treatment they give to state and local government employees." A. 14 (emphasis added) Neither the court nor the Board cited any authority for adding a "generally" gloss to Barker and Davis.

The court adopted the Board's criticism of the veterans for

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4. The Board found that between 1934 and 1945 the state gradually required public retirement systems to become "contributory." A. 35. But the statutes the Board cited mandated only that newly hired employees must contribute to retirement funds; current employees could stay in pre-existing non-contributory systems. A. 34-35. Thus, as the Board recognized, some public employees remained in non-contributory plans well after 1945. Id.

5. The lower court's entire discussion of this point consists of a long quote from the Appellate Tax Board's decision and so the court must be considered to have adopted the Board's rationale. A. 49-50.

not presenting evidence as to which and how many state or local employees still benefit from these exemptions. A. 49, quoting A. 14-15, 34-35. The court held it was the veterans' "responsibility" to introduce evidence on this point and that without such evidence it could not find there were any such employees. Quoting the Board, the court opined "it is unlikely [such employees] were numerous, or that they will survive long enough to require legislative action to remove their more favorable treatment." A. 49-50. The Board could not find that there "is now an active and significant class of state or municipal employees receiving non-contributory retirement benefits" which are exempt from Massachusetts tax. A. 15.[6] It added

> "survival of any persons entitled to the exemptions granted in 1917 hardly justifies a finding of current legislative discrimination in favor of local retirees. The appellants made no attempt to prove that any actual discrimination occurred against military retirees as a result of the 1917 exemptions."

A. 35.[7]

None of this bears any relationship to Barker or Davis. Neither case required federal retirees to show an "active and significant class" favored by the state or that "actual discrimination"

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6. The court showed rather little imagination. An employee who joined a non-contributory retirement system in 1937 at the age of 21 would be only 76 today, not necessarily older than a federal military retiree who, unlike him, must pay state income tax on his non-contributory retirement benefits.

7. The court and Board faulted the veterans for not to rebutting a defense the state never raised; that these exemptions have lapsed into desuetude. Surely the veterans are entitled to rely on the legal effect of unrepealed state laws unless and until the state itself demonstrates they have lapsed and should be ignored.

was being practiced. Plaintiffs showed facial statutory discrimination in favor of state retirees. That showing having been made here,[8] the veterans are entitled to prevail.

This Court's decisions hold that the basic rule of intergovernmental tax immunity is simple. A state taxing scheme discriminates against those associated with the federal government if "it treats someone else better than it treats them." Washington v. United States, 460 U.S. 536, 545 (1983) (emphasis added).

There is no quantitative threshold of discriminatory impact below which a state can shelter a violation of intergovernmental tax immunity. Application of that principle "does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree." TrinityFarm Construction Co. v. Grosjean, 291 U.S. 466, 471 (1933).[9]

Even though only a limited number of retirees may still benefit from Massachusetts' statutory favoritism, the resulting

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8. Massachusetts' statutory favoritism to state and municipal retirement benefits extends beyond the laws just discussed. For example, under Mass. G.L. c. 32, §19, the rights of a member of a Massachusetts state or local retirement system to an annuity, pension or retirement allowance are totally exempt from taxation, including the state income tax. A. 18. Federal retirement benefits enjoy no such privilege.

9. In Schuykill Trust Co. v. Pennsylvania, 296 U.S. 113, 120 (1935) the Court held that a Pennsylvania tax scheme was invalid because the burden of the tax was "lifted in respect of some securities." (Emphasis added). See also Phillips Chemical Co. v. Dumas Indep. Sch. District, 361 U.S. 376, 381 n.6 (1960) ("[a]lthough the exceptions . . . reduce the extent of the discrimination . . . they obviously do not eliminate it.").

discrimination is unambiguous. In enacting 4 U.S.C. § 111, Congress granted states the privilege to tax federal employees but only on a strict condition of non-discrimination. Since Massachusetts' highest court has conceded the state does not meet that condition, it cannot utilize the privilege granted by section 111.

C. Exempting State and Municipal Non-Contributory "Pension" Benefits From Taxation Is Prohibited By 4 U.S.C. §111.

Having chosen to discount the state laws which expressly exempt some non-contributory public pensions from taxation, the court below focussed exclusively on Mass. G.L c. 62, §2(a)(2)(E) which exempts from state tax benefits from "contributory" pension systems of state, local and federal employees. A. 47. It held that the pension systems of Massachusetts state and local retirees are "contributory" while the federal military pension system is "non-contributory." That distinction, it concluded, is a "significant difference" sufficient to pass muster under section 111. Id.

The first flaw in this reasoning is that the Massachusetts public retirement program is not the simple one-dimensional system the court's opinion suggests. By law Massachusetts defines each employee's retirement benefit as having two components, an "annuity" derived from employee contributions and a "pension" which comes exclusively from "contributions made by the appropriate governmental unit." See Mass. G.L. c. 32, §1, ¶¶ 8,30. Yet the state exempts from tax the entirety of state and local retirement benefits, not just the contributory "annuity" portion.

Thus, whatever section 2(a)(2)(E) seems to say, in practice, Massachusetts exempts non-contributory "pensions" which its retirees receive. Since those benefits are derived solely from employer-supplied funds, the contributory/non-contributory dichotomy, the sole basis upon which the Supreme Judicial Court upheld discrimination against the veterans, is irrelevant.

State and municipal retirees receive non-contributory

"pensions" and pay no taxes on them. Indeed that non-contributory "pension" comprises approximately 90% of state employees' retirement benefits. A. 49.[10] Because that retirement benefit is "non-contributory," there is no "significant difference" between it and the retirement benefits received by the veterans here.

The state cannot defend exempting these non-contributory "pensions" from tax on the ground that its retirees also receive contributory "annuity" benefits. First, as noted in Davis, that argument would only justify exempting the contributory portion of benefits state retirees receive, not the "blanket" exemption the state has actually given. Davis, 489 U.S. supra at 817.

Second, a system of derivatory exemptions would itself be discriminatory, and so violate section 111 because federal military retirees do not have a comparable opportunity to shelter their non-contributory retirement benefits from state tax by mixing them with contributory pension benefits at a ratio of nine parts to one.

Massachusetts' policy of exempting non-contributory "pension" benefits paid to state retirees while taxing veterans' non-contributory retirement benefits discriminates against federal employees. This violates the plain language of 4 U.S.C. § 111. Davis v. Michigan, supra. Since the state has not demonstrated a "significant difference" between those two types of benefits, it is not longer entitled to exercise the Congressionally granted privilege of taxing petitioners' retirement benefits.

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10. Contrary to the implication below, A. 48-49, petitioners' argument is not that state employees contribute so little as to make the entire state retirement system "non-contributory." Rather they argue that one of the two separate retirement systems the state effectively operates, the "pension" system, is unambiguously non-contributory in any sense of the word. Thus there is no basis upon which the state can justify not taxing those non-contributory benefits while still taxing federal military retirement benefits.

D. Massachusetts' Retirement System is Effectively Identical to the Federal Military System, so Exempting State Benefits Violates 4 U.S.C. §111.

A second flaw in Massachusetts' effort to shelter its exemption of public retirement benefits under the "contributory" umbrella is that the state's retirement system is not, under its own definition, really "contributory" at all.

Massachusetts has a unique form of "contributory" retirement system. In 1987, the state amended Mass. G.L. c. 32, §22(10), so its employees no longer make any contributions, as that term is normally understood, to their retirement systems. See St. 1987, c. 697, §75. As amended, section 22(10) provides in part:

> Each government unit . . . shall assume and pay the contributions which would be payable by the employees as members . . . . Such contributions, although designated as employee contributions, will be paid by the applicable governmental unit . . . in lieu of contributions by the employee . . . . The contributions so assumed shall be treated as employer contributions in determining tax treatment under the United States Internal Revenue Code. The contributions so assumed shall be treated and identified . . . as member contributions for purposes of the retirement system . . . and for all purposes of chapter sixty-two [the state income tax].

While state employees do pay state tax on their "contributions," they no longer pay federal income tax on them. A. 19; 26 U.S.C. §414(h)(2).[11] Thus the lower court's statement, A.

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11. Because Massachusetts uses the federal definition of "gross income" to define income for state tax purposes under Mass. G.L. c. 62, §2(a), state employees should also escape paying any state income tax on their retirement "contributions." But when its own revenues are involved, the state is less willing to accept its

48, that "employees already have been taxed on the contributions they make to their pensions," is misleading. There is little economic difference between a soldier earning $30,000 per year with the United States contributing $2000 to his retirement fund and a state employee who "earns" $32,000 per year with $2000 taken off the top as a pre-tax pension "contribution." Giving "contributory" its ordinary, common sense meaning, Massachusetts has not had a "contributory" retirement system since 1987.

Massachusetts shares this common sense understanding of what a "contributory" retirement system is. In his published response to Barker, which the Supreme Judicial Court cited twice, the Commissioner stated that employee "contributions" can only come from funds previously subject to taxation.

> "A contributory pension is one in which amounts contributed to the plan are includible in the Massachusetts gross income of the employee . . . . Under a non-contributory plan, amounts contributed on behalf of an employee are not included in the gross income of the employee and are therefore not subject to tax at the time of contribution."

Technical Information Release ("TIR") 92-3, A. 47, n. 4; A. 48.[12]

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legal fictions. The state requires taxpayers to add back into adjusted state income "contributions" excluded from federal gross income. Mass G.L. c. 62, §2(a)(1)(I).

12. By inserting "Massachusetts" before "gross income" the Commissioner avoided explicitly defining the state's system as "non-contributory." But neither he nor the lower court made any effort to explain why re-inclusion of "contributions" into state adjusted gross income should have a greater consequence than their exclusion from the federal gross income.

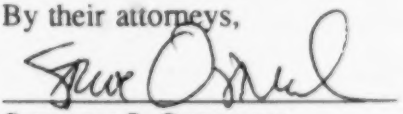
Since 1987, state "employee contributions" have not been included in employees' federal gross income. Using the Commissioner's own logic, the state's system thus is effectively non-contributory. Once again, the sole basis the state has relied upon to distinguish between federal and state retirees has vanished and the Court confronts a plainly unlawful effort to tax federal retirees while exempting state retirees.

Plainly Massachusetts wishes to have its cake and eat it too. It classifies contributions to state and local retirement funds as employer contributions when that works to employees' advantage and classifies them as employee contributions when that, diametrically opposite, conclusion works to their advantage. This distortion of the state's tax laws in order to "benefit itself and those in privity with it" is just the sort of scheme to reduce state employment costs which Justice Kennedy held is barred by section 111. Davis, 489 U.S. supra at 815, n.4.

CONCLUSION

For the foregoing reasons, petitioners request that their application for a writ of certiorari be granted.

Respectfully submitted,
John E. Filios et al.
By their attorneys,



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DATED: Boston, Massachusetts: November 16, 1993.

The Commonwealth of Massachusetts
Appellate Tax Board

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Docket No(s). 171106, 170813-170814,
171107, 171216, 171711,
171828, 171831, 172022

JOEN E. & ELEANOR G. FILIOS, et al,

Appellants

COMMISSIONER OF REVENUE,

Appellee

DECISION

Decisions for the Appellee. Appellants' Consolidated Request for Conclusions of Law, Nos. 1 through 6, are refused. Chairman Timothy P. O'Brien did not participate in the consideration or decision of these appeals.

APPELLATE TAX BOARD

By _____ Chairman

_____ Member

_____ Member

_____ Member

_____ Member

Attest: _____ Clerk

Date: October 8, 1991

(Seal)

Income tax

NOTICE: An appeal may be taken to the Appeals Court by either party to these proceedings. A claim of appeal should be filed with this Board in accordance with the Massachusetts Rules of Appellate Procedure.

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COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

JOHN E. and ELEANOR G. FILIOS,

et al.

v. COMMISSIONER OF REVENUE

Docket Nos. 171106, 170818-170824, 171107, 171216

171711, 171828, 171831, 172022

Promulgated: July 1, 1992

This is an appeal under the formal procedure pursuant to G.L. c.62C s.39, as amended, from the refusal of the appellee to abate income taxes assessed under G.L. c.62 s.2 for the tax years 1985 through 1988.

These findings of fact and report are made pursuant to a request by the appellants under G.L. c.58A s.13, as amended,

and Rule 32 of the Rules of Practice and Procedure of the Appellate Tax Board.

Robert E. Dickinson, Esq., for the appellant.

Constance M. Simon, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

The appellants are residents of the Commonwealth who received income from military retirement compensation from the United States, based on the details of their military service, during some or all of the tax years at issue. This compensation was included in the federal gross income of each appellant, and thus became part of each appellant's Massachusetts gross income. Each appellant paid the taxes due on the retirement compensation. The military retirement system is a non-contributory system: military personnel do not have a separate, identified amount deducted periodically from their pay and deposited in a segregated retirement fund from which retirement benefits are paid. (It appears that since 1984, under

P.L. 98-94, s.925, funds appropriated annually and charged to the manpower budget of the Department of Defense are transferred to a Military Retirement Fund administered by the Treasury Department.) The board's findings are based in large part on a Stipulation of Agreed Facts submitted by the parties and on the exhibits attached thereto.

The appellants are members of various military organizations which in turn are members of an umbrella organization, the Massachusetts Council of Military Organizations (MASSCOMO), whose counsel represents all of the appellants. On or about March 3, 1988, MASSCOMO requested a ruling from the Department of Revenue that military retirement pay was not taxable. Stipulation, Exhibit 3. In a letter dated February 16, 1989, the Commissioner replied that military retirement pay was taxable. Stipulation, Exhibit 4.

On March 28, 1989 the United States Supreme Court issued its decision in the case of Davis V. Michigan Department of the Treasury, 489 U.S. 803 (1989), holding that the Michigan

income tax violated the federal intergovernmental immunity statute by denying to retired federal civil service employees the favorable treatment accorded to retired state and local governnent employees. Stipulation, Exhibit 5. On May 10, 1989, the Commissioner of Revenue issued a Technical Information Release (TIR 89-6) stating that the Davis decision did not affect the Massachusetts tax treatment of federal retirement income, including military retirement income. Stipulation, Exhibit 6. By letter dated November 14, 1989, the Rulings and Regulations Bureau denied MASSCOMO's request to reconsider the Commissioner's position. Stipulation, Exhibits 7 and 8.

In the meantime the appellants had filed applications for abatement or amended returns excluding their military retirement income for some or all of the tax years 1985-1988, the appellee had denied the applications and some of the appellants had already filed their appeals with the Appellate Tax Board. The table below summarizes the data affecting the

board's jurisdiction in these appeals. The board found that the requirements of its jurisdiction had been met in Docket numbers 170818, 170819, 171107 (1985 only), 170821 (1985, 1988), 171106, 171828 (1987, 1988), 171831, 171711 (1987), and 170824 (1986, 1987). In each of the remaining appeals listed the fulfilment of one or more of the conditions of jurisdiction is at least doubtful. In view of the board's decision for the appellee on the merits of all of the appeals, however, a finding of jurisdiction would not affect the result of any of them.

Table of Jurisdictional Facts

Taxpayer	Docket No.	Fiscal year	Return filed	Application Filed	Application Denied	Appeal filed
Cheeseman	170818	1985	3/25/86	4/14/89	9/12/89	10/30/89
		1986	4/7/87			
		1987	3/29/87			
Cipolla	170829	1985	4/12/86	4/18/89*	10/4/89	10/30/89
Conroy	170819	1985	3/21/86	3/31/89	10/3/89	10/30/89
Davenport	171107	1985	4/14/86	4/17/89	9/22/89	11/17/89
		1986	*	*		
		1987	10/17/88*			
Depperman	171216	1986	*	5/31/89	11/10/89	11/29/89
		1987	*	*		
		1988	*	*		
DeSmet	170821	1985	4/15/86	5/3/89	11/10/89	1/5/90
		1986	*	*		
		1987	2/5/88*			
		1988	2/2/89			
Filios	171106	1986	4/11/86	4/15/89	9/22/89	11/17/89
Fumia	171828	1986	*	7/4/89	11/10/89	1/5/90
		1987	2/20/88			
		1988	4/17/89			
Greenberg	171831	1985	4/10/86	7/1/89	11/10/89	1/5/90
		1986	4/10/87			
		1987	4/10/88			
Hayes	171822	1985	7/21/86#	6/5/89	9/14/89	1/30/89*
		1987		4/1/88#		
Mainville	171711	1986	*	9/25/89	12/20/89	12/26/89
		1987	4/12/89		9/18/89	
		1988	*		9/18/89	

(continued on next page)

Table of Jurisdictional Facts (continued)

Taxpayer	Docket No.	Fiscal year	Return filed	Application Filed	Application Denied	Appeal filed
Smith	170823	1985	2/18/86#	4/14/89	10/4/89	10/30/89
Spatafora	172022	1987	*	10/6/89	5/8/90	
		1988	*	10/12/89	12/10/89	1/22/90
Tracy	170824	1986	1/28/87	6/1/89	9/14/89	10/30/89
			1987	2/1/88		10/30/89
			1988	*		

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* Data missing or questionable
\# Check or bill date from DOR printout

Source: Appellants' Exhibit: Jurisdictional Documents

Income from a contributory retirement fund of the United States government, the commonwealth, or any political subdivision thereof, to which the employee has contributed, is deductible from Massachusetts gross income. Although the military retirement system is not contributory and the appellants have not contributed to it, the appellants contend that they had made "imputed contributions" toward their retirement benefits through reduced salaries, and therefore are entitled under the Davis case to be treated in the same manner as Massachusetts public employees, whose contributory retirement pay is exempt. In support of this position they placed in evidence several congressional documents.

A Study of the Military Retired Pay System and Certain Related Subjects is a Report to the Committee on Armed Services of the United States Senate by the Study Committee of the University of Michigan, dated July 6, 1961 (87th Congress, 1st Session), submitted as appellants' Exhibit 1. One of of the matters that the Committee asked the study to

address was the possibility of adopting a contributory retirement system. Exhibit 1 p. 1. The report states, "Retired pay is, in a real sense, a system of deferred pay designed to assist officers and enlisted men make the transition to civilian life and to provide basic economic security in the event that such a transition cannot readily be made." Exhibit 1 p. 8. Chapter VIII, "Contributory Vs. Non-Contributory Retirement Plans," states that although contributory plans predominated in private industry, many of the larger plans were non-contributory, probably non-contributory plans covered more employees, and during the past decade there had been a substantial trend toward non-contributory plans. The report states that the military retirement plan in the United States had always been non-contributory and without advance funding. Exhibit 1 p. 65. The report says that the establishment of a contributory system would not produce significant savings to the government and on the contrary would probably require increases in pay to offset the effect of the contribution on military employees, in addition

to administrative costs of maintaining an account for each employee. Exhibit 1 pp. 66-67. The report concludes that Congress should not adopt a contributory system. Exhibit 1 p. 68.

Report No. 549 from the Committee on Armed Services titled Uniformed Services Pay Act of 1965 (appellants' Exhibit 2), prepared to accompany H.R. 9075, states that the military pay increase proposed therein "fully recognizes the tax advantage and the non-contributory retirement aspect of military compensation and takes them into account." Exhibit 2 p. 18; see also pp. 20-26. The act itself, P. L. 89-132, dated August 21, 1965, was in evidence as appellants' Exhibit 3.

Report No. 92-82, Amending the Military Selective Service Act of 1967; to Increase Military Pay; to Authorize Military Active Duty Strengths for Fiscal Year 1972; and for Other Purposes, a report dated March 25, 1971, from the House Committee on

Armed Services to accompany H.R. 6531, was in evidence as appellants' Exhibit 4. It proposes increases in regular military compensation to levels bearing a reasonable relationship to civilian wages for similar work and recognizes that regular military compensation does not include a specific retirement contribution. Exhibit 4 p. 24. The act itself, P.L. 92-129, September 28, 1971, was in evidence as appellants' Exhibit 5.

Although these documents provide evidence that military pay was lower than it would have been had the retirement system been financed by employee contributions, in the board's opinion they fall short of demonstrating an "imputed contribution."

The appellants' next contention is that in taxing their military retirement compensation, the Massachusetts income tax discriminates against them, in violation of the constitutional principle of intergovernmental immunity as embodied in 4 USC s.111, and in violation of the income-tax authorization contained in Article 44 of the Amendments to the Massachusetts

Constitution, because the non-contributory retirement compensation of certain public employees of Massachusetts cities and towns are specifically exempted from tax.

Exemptions from income tax were made in 1917 for pensions and annuities paid from funds established for the purpose for annuities paid by cities and towns on account of service in a police or fire department (St. 1917 c.270) and for public school teachers in Boston (Sp. St. 1917 c.327 s.1). In 1936 all city and town retirement plans were made contributory; but some employees did not elect to join the contributory system, and in 1973 income from non-contributory annuities and pensions received for service in the police or fire department of a city or town by a person who was employed when the contributory system was established and did not elect to join the contributory system was expressly exempted from income tax (St. 1973 c.876 s.1). In an "information letter" dated June 11, 1990, counsel to the appellee's Rulings and Regulations Bureau told one of the appellants that to the best of

his knowledge St. 1973 c.876 had been neither repealed nor amended. Appellants', Exhibit 11.

Unlike the Michigan statute at issue in Davis, the Massachusetts statutes taken together do not deny to federal employees generally any favorable treatment that they give to state and local government employees. Income from contributory plans of the federal government is exempt from Massachusetts income tax in the same manner as income from contributory plans of Massachusetts state and local governments. The only exemptions provided for non-contributory retirement benefits are given for service in a local police or fire department and for Boston public school teachers. Both of these exemptions were enacted in 1917, the year after the imposition of the income tax. In order to be covered by a non-contributory plan whose exemption was confirmed by St. 1973 c.876 s.1, an employee in the police or fire service of a city or town would have to have been in active service when the contributory system under Chapter 32 was

established in 1936 or 1937 and elected not to join it. If any qualifying employees existed during the tax years at issue, it was the responsibility of the appellants to produce evidence of the fact. Since no such evidence was furnished to the board, no finding can be made that the classification established by St. 1917 c.270 and confirmed by St. 1973 c.876 had any members during the years at issue. Further, the board notes that the active life of a person in the police or fire service would be unlikely to have continued for 55 years from 1936, when the municipal retirement plans were made contributory, to 1991. If the class had any members during the years at issue, it is unlikely that they were numerous, or that they will survive long enough to require legislative action to remove their more favorable treatment or give similar treatment to military retirees. The board therefore did not find that there is now an active or significant class of state or municipal employees receiving non-contributory retirement benefits which are deducted in determining Massachusetts gross income under the provisions of

G.L. c.62 s.2(a)(2)(E), or that under the standard of Davis the Massachusetts income tax discriminates against federal military employees.

The board therefore decided for the appellee in all of the appeals for all of the fiscal years at issue.

OPINION

Private or governmental pensions, including military retirement benefits, are included in gross income for purposes of the federal income tax. IRC s.61(a)(11); Reg. s.1.61-11. Massachusetts gross income is federal gross income with certain additions and deductions. G.L. c.62 s.2(a).

The appellants cite several cases for the proposition that a pension is not income for Massachusetts income tax purposes: Lyon v. Commissioner of Corp. & Tax., 258 Mass. 450 (1927), holding that a retirement allowance paid to a professor by a

foundation was a gift, not income; Hawley v. Commissioner of Corp. & Tax., 2 A.T.B. 657 (Docket No. 12543, 1939), holding that a federal pension received by the widow of a Civil War veteran was a gift; State Tax Commission v. Gray, 340 Mass. 535 (1960), holding that old-age benefits received under the federal Social Security Act were not retirement allowances taxable under former G.L. c.62 s.5(g); and Bogardus v. United States, 302 U.S. 34, 44 (1937), holding that a gift by a corporation to a former employee was nonetheless a gift for being inspired by gratitude for past service. Whatever the grounds for holding that the payments received in those cases were not compensation for services performed as an employee, the board holds that under the income tax as restructured by St. 1971 c.555 retirement benefits paid by private or public employers, including military pensions, are properly classified as income from employment and thus are includible in Part B gross income under G.L. c.62 s.2(b)(2) unless specifically deductible under other provisions of law. As early as 1920, in

fact, the Legislature provided that any retirement allowance received by a retired employee of the Commonwealth or any local government, or of a corporation, firm, or individual, was to be regarded as "income from profession, employment, trade or business" and taxed as such under St. 1916 c.269 s.5(b), subject to any exemptions therein provided.

The rights of a member of a Massachusetts state or local government retirement system to an annuity, pension, or retirement allowance are exempt from taxation, including income taxes levied under G.L. c.62. G.L. c.32 s.19. Among the items to be deducted in determining Massachusetts gross income pursuant to G.L. c.62 s.2(a)(2), and thus exempted from tax, is the following:

> (E) Income from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed.

A deduction from total Part B income is provided for amounts,

not exceeding $2,000, deducted from wages as contributions to those retirement funds. G.L. c.62 s.3(B)(a)(4). See DD 86-12. (As a result of provisions enacted by St. 1987 c.697 ss.75 and 118, such contributions to Massachusetts state or local government retirement funds are treated as employer contributions for federal tax purposes (G.L. c.32 s.22(10)), but remain employee contributions for Massachusetts tax purposes (G.L. c.62 s.2(a)(1)(I). Thus they are not included in Massachusetts gross income; as before, however, amounts received from the retirement fund are included in federal gross income but not in Massachusetts gross income. See LR 87-8.) The result of these provisions for Massachusetts income taxation, taken together, remains that contributions to federal, state, or local retirement systems are not taxed when made, and the retirement benefits themselves are not taxed when received. Income from a contributory fund of another state or a political subdivision thereof which accords a similar exemption for income from Massachusetts funds is

exempt from tax in Massachusetts. G.L. c.62 s.3(B)(a)(4); TIR 89-10.

By the express terms of G.L. c.62 s.2(a)(2)(E), contributory annuities received by civilian employees of the federal government are exempt from Massachusetts taxation. LR 83-38. It is undisputed, however, that the military retirement system is non-contributory and that military personnel make no direct contributions out of their compensation toward the financing of any retirement benefits to which they may be entitled on leaving military service. By the terms of G.L. c.62 s.2(a)(2)(E), therefore, recipients of military retirement benefits from the United States are not entitled to deduct them from federal gross income in determining their Massachusetts gross income.

The appellants contend, however, that taxing their retirement benefits discriminates against them in violation of the constitutional doctrine of intergovernmental immunity as codified in 4 U.S.C. s.111. Decisions of the Supreme Court of

the United States make clear that the doctrine of intergovernmental immunity protects not only the federal government itself and its instrumentalities but also current and retired employees from discriminatory state taxation. Although the Massachusetts statute allows a deduction for all public contributory pensions, federal, state, and local, to which those entitled to them have contributed, and allows no deduction for any non-contributory pension, public or private, the appellants contend (1) that the military retirement system is in effect contributory, because the difference between the levels of military pay and other governmental pay for comparable work amounts to an "imputed contribution," and (2) that there are Massachusetts public employees whose non-contributory pensions are exempt from tax under separate statutes.

The appellants also contend that the discrimination against their retirement benefits violates Article 44 of the Amendments to the Massachusetts Constitution, which authorizes the levy of an income tax.

Intergovernmental Immunity

The doctrine of intergovernmental immunity had its genesis in McCulloch v. Maryland, 4 Wheat. 316 (1819), which held that as applied to the Bank of the United States, a Maryland tax imposed on all banks not chartered by the Maryland legislature unconstitutionally interfered with the functions of an instrumentality of the United States established to carry out the delegated powers of the government of the United States. Later decisions extended the benefit of the doctrine to persons dealing with the United States or its instrumentalities, including federal government employees. For the history of the development of the doctrine in relation to compensation of government employees, see Annotation: "State income tax as violating immunity of United States -- Supreme Court Cases," 103 L.Ed.2d 1027; Paul J. Hartman, Federal Limitations on State and Local Taxation, ss.6.7, 6.15-6.19; as to retirement benefits, see Id., Cum. Supp. January 1992, s.6.24.

The Public Salary Tax Act of 1939 imposed federal income tax on the salaries of state and local government employees and out of considerations of fairness also waived whatever remaining intergovernmental immunity might have shielded federal employees from nondiscriminatory state taxation. As amended, this statute is now codified in 4 U.S.C. s.111, which provides as follows:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . .by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

On its face this statute seems to permit the Commonwealth to tax military retirement pay of its residents; but the appellants argue that in taxing military retirement pay, while allowing the deduction of retirement benefits received by state and local employees and federal civil service employees, the Massachusetts income tax discriminates against military employees because of the source of their compensation.

Recent United States Supreme Court Cases

These appeals were brought after promulgation by the Supreme Court of the United States of its decision in Davis V. Michigan Dept. of Revenue, 489 U.S. 803 (1989). A Michigan statute levied an income tax on taxable income, defined as adjusted gross income under the Internal Revenue Code with certain adjustments. Among the adjustments was a deduction in full of retirement benefits received from the state or its political subdivisions and a limited deduction of retirement benefits received from any other retirement system. Davis, a former employee of the federal government, received retirement benefits under the Civil Service Retirement Act and paid taxes on the amount of the benefits received over the limit. In his appeal to the Supreme Court, Davis relied on 4 U.S.C. s.111. In the Court's view, that statute's retention of immunity from discrimination against federal employees because of the source of their compensation was "coextensive with the prohibition against discriminatory taxes embodied in the modern

constitutional doctrine of intergovernmental tax immunity. Cf. Memphis Bank & Trust [Co. v. Garner 459 U.S. 392] at.396-397." 489 U.S. at 813. In an opinion written by Justice Kennedy, the Court decided for the taxpayer; Justice Stevens wrote a dissent.

After the board promulgated its decision in the instant - appeal, the Supreme Court decided the case of Barker v. Kansas, 503 U.S. _ , 118 L.Ed.2d 243, 60 U.S.L.W. 4322 (April 21, 1992), holding expressly that imposing a tax on the retirement benefits of U.S. military personnel, while not taxing retirement benefits of state and local government employees, constituted an invalid discrimination under both the consent provision of 4 U.S.C. s.111 and the constitutional principle of intergovernmental immunity.

Immunity of Current Employees of Government

In Davis v. Michigan, supra, the Court disposed of Michigan's contention that Davis was not entitled to claim

the protection of an imnunity doctrine originally intended to protect the government itself. "It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. . . . But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary." 489 U.S. at 814 (citations omitted). There is no question that the compensation of current federal employees is protected from discriminatory taxation.

Immunity of Retired Employees of Government

In Davis v. Michigan, supra, the Court also held that the application of 4 U.S.C. s.111 was not limited to the compensation of current employees of the federal government but extended to retirement benefits, which, although deferred, are based and computed on an employee's salary and length of

service, accrue on account of service to the government, and thus "fall squarely within the category of compensation for services rendered 'as an officer or employee of the United States.' " 489 U.S. at 808. As such, the Court held, they are included in the "pay or compensation for personal service as an officer or employee of the United States" against which states are forbidden to discriminate because of its source. 489 U.S. at 809-810.

In Barker v. Kansas, supra, the Kansas court, attempting to distinguish Davis, had held that unlike state retirement benefits, which were deferred compensation for past services, military retirement benefits were "current pay for continued readiness to return to duty." 249 Kan. 186, 196; 815 p.2d 46, 53 (1991). The court based this conclusion on findings that military retirees retired from active duty only but remained members of the armed forces, were still subject to the Uniform Code of Military Justice and could be court-martialed for offenses committed after retirement, were subject to restrictions

on civilian employment after retirement, and were subject to involuntary recall. The military retirement system also differed from the state system in that it was non-contributory, funded entirely by annual congressional appropriations; hence no part of the benefits had ever been taxed. The Kansas court held that the state's taxation of military retirement pay was authorized by 4 U.S.C. s.111, in the same manner as military active-duty pay.

The Supreme Court did not agree that military retirement benefits were pay for current services, pointing out that they were not calculated by reference to continuing duties but based on rank, pay at retirement, and years of creditable service, and that the method of calculation did not differ significantly from that used for determining state retirement benefits. After analyzing other decisions and congressional intent in other provisions relating to military retirement benefits, the Court concluded that for purposes of 4 U.S.C. s.111 military pensions were deferred pay for past services and in this respect were not significantly different from benefits paid to Kansas

state and local government employees.

The board concludes that under 4 U.S.C. s.111 Congress did not consent to discriminatory state taxation of federal retirement benefits.

Explicit Discrimination Favoring State and Local Retirees

In Davis v. Michigan, Michigan argued that its inconsistent treatment of federal and state government retirement benefits was justified by significant differences between them. Of the state's "interest in hiring and retaining qualified civil servants through the inducement of a tax exemption for retirement benefits," the Court said: "This argument is wholly beside the point, however, for it does nothing to demonstrate that there are "significant differences between the two classes" themselves; rather, it merely demonstrates that the State has a rational reason for discriminating between two similar groups of retirees. The State's interest in adopting the discriminatory tax, no matter how

substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment." 489 U.S. at 816. Of Michigan's argument that its benefits were "significantly less munificent" than those of the federal government, the Court said: "Even assuming the State's estimate of the relative value of state and federal retirement benefits is generally correct, we do not believe this difference suffices to justify the type of blanket exemption at issue in this case . . . . A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual employees." 489 U.S. at 817 (citations omitted).

Concluding that the Michigan Income Tax Act violated principles of intergovernmental immunity by favoring state and local government retirees over federal government retirees, the Court ruled that Davis was entitled to a refund of taxes already

paid under the act. On Davis's claim for prospective relief, the Court remanded the case to the Michigan court to resolve questions of state law regarding the appropriate method of complying with the mandate of equal treatment, whether by extending the exemption to retired federal employees or by eliminating the exemptions for retired state and local government employees. 489 U.S. at 818.

In his dissent in Davis v. Michigan, Justice Stevens stated his opinion that the doctrine of intergovernmental immunity did not require a state to give employees of another sovereign more favorable tax treatment than that given to any other group subject to its tax jurisdiction. 489 U.S. at 823. In a concurring opinion in Barker v. Kansas, joined by Justice Thomas, Justice Stevens agreed that the result was controlled by Davis but reiterated his belief that "a state tax burden that is shared equally by federal retirees and the vast majority of the State's citizens does not discriminate against those retirees." 118 L.Ed.2d at 254, 60 U.S.L.W. at 4325. In neither case did

the majority opinion address this question. As the law stands, a tax that favors state and local retirees over federal retirees violates governmental immunity even if the latter are treated no differently than private retirees.

After the publication of the Supreme Court's opinion in Davis, the Commissioner of Revenue stated in a Technical Information Release that the applicable Massachusetts income tax statute does not violate intergovernmental tax immunity doctrine as interpreted in the case (TIR 89-6).

> Unlike Michigan law, the Massachusetts statute does not discriminate on the basis of the source of the benefits. The determining factor for the Massachusetts exemption is whether the retirement fund is a 'contributory fund to which the employee has contributed.' The statutory provisions treat the same way retirement funds of the U.S. government and those of the state and political subdivisions of the state. Therefore, the Davis decision does not affect the Massachusetts tax treatment of federal retirement income, including military retirement income. Any federal retirement income is exempt from Massachusetts tax if the system is contributory and the employee actually contributed.

The board agrees with the Commissioner's analysis.

G.L. c.62 s.2(a)(2)(E) allows a deduction for income from a

contributory retirement fund of the United States government in the same manner as for income from a contributory retirement fund of the Commonwealth or any of its political subdivisions. See TIR 92-3, promulgated after the publication of the decision in Barker v. Kansas. Federal employees who have contributed to their retirement funds are treated more favorably than retirees from private business and more favorably than the taxpayers in Davis v. Michigan or Barker v. Kansas. Federal retirees who have not contributed are treated in the same manner as all other retirees who have not contributed, public or private, with the single exception that will be discussed in the next section.

Government Retirees Favored by Type of Pension

The Massachusetts statute allows the deduction from federal gross income of contributory pensions of employees who have contributed to retirement funds of the United States or of a Massachusetts state or local government. Thus, for income-tax purposes, G.L. c.62 s.2(a)(2)(E) makes two

distinctions: (1) between public and private pensions, and (2) for public pensions, between contributory and non-contributory pensions. In taxing military retirement benefits, the statute does not discriminate in favor of any private pension; it discriminates in favor only of those public pensions which are contributory and whose beneficiaries have contributed to them.

Massachusetts does not allow a general exemption for income from non-contributory state or local retirement funds. Although it appears that some non-contributory local retirement systems exist for veterans who have completed 30 years of state or local government service, the Commissioner of Revenue takes the position that they are includible in Massachusetts gross income when received, except for the return of any contributions made, and that accrued interest paid with such contributions is taxable at the Part A rate. LR 81-53. The appellants argue, however, that exemptions created by the Legislature in 1917 for non-contributory pensions of certain municipal employees discriminate against military retirement

benefits in violation of 4 U.S.C. s.111.

Long before the Legislature restructured the income tax in 1971, it allowed exemptions in 1917 for pensions of Boston public-school teachers (Sp.St. 1917 c.327) and members of local police and fire departments (St. 1917 c.270). If there were enough of the latter surviving in 1973 to justify continuing the exemption (St. 1973 c.876 s.l), there was no evidence than even a few of them are still taking advantage of the exemption. In a series of statutes enacted between 1934 and 1945 the Legislature made all public retirement systems contributory. St. 1934 c.285, St. 1935 c.102, St. 1936 c.318, St. 1945 c.658. The survival of any persons entitled to the exemptions granted in 1917 hardly justifies a finding of current legislative discrimination in favor of local retirees against the beneficiaries of federal non-contributory plans. The appellants made no attempt to prove that any actual discrimination occurred against military retirees as a result of the 1917 exemptions.

The appellants ask the board to ignore the

non-contributory character of the military pension system on the ground that the difference between the scale of military pay and the pay scale of state and local governments amounts in effect to an "imputed contribution" to the military pension system. In the month before the publication of the Supreme Court's opinion in Davis v. Michigan, the Commissioner of Revenue analyzed the question and some of the congressional documents and concluded that the plain meaning of "contributory" required limiting the exemption to contributory plans to which the employees have actually contributed. LR 89-1. The evidence available to the board on this point, like that reviewed by the Commissioner, was at best inconclusive. In Barker v. Kansas, supra, which specifically dealt with discrimination against military pensions, neither the taxpayers nor the Supreme Court made any suggestion that an "imputed contribution" could be inferred from the level of active military pay. The board sees no justification for venturing into territory which the Supreme Court ignored.

The appellants also attack the validity of the distinction between contributory and non-contributory pensions on the ground that contributions of employees account for only about 10 percent of each pension, the remaining 90 percent being appropriated directly from the treasury. If this estimate is accurate, its implications should be dealt with by general legislation and are beyond the power of this board to resolve in the instant appeal.

Article 44 of the Amendments to the Massachusetts Constitution

The Legislature's authority to levy an income tax is contained in a 1915 amendment, Article 44, to the Massachusetts Constitution. The amendment provides in pertinent part as follows:

> Full power and authority are hereby granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate

> than income derived from property, and may grant reasonable exemptions and abatements. . . .

The appellants argue that taxing military retirement benefits, while exempting contributory retirement benefits of state, local, and federal employees, violates the constitutional requirement that the tax on incomes derived from the same class of property be taxed at a uniform rate. The appellants reason that pensions are a single class of property within the meaning of Article 44. They assert that in contributory systems almost 90 percent of the retirement pay is paid by the governmental employer, not by the employee, and argue that as a result the difference between contributory and non-contributory systems is insufficient to justify a difference in tax treatment.

After examining the provisions of G.L. c.32 s.12(2) regarding the composition of the retirement allowances payable under each of the three available options and the provisions of G.L. c.32 s.22 concerning methods of financing of the benefits, the board is not persuaded that the appellants have done justice

to the complexity of the calculations required. Whether by analysis of the statutes or the presentation of evidence, the appellants had the burden of establishing their rights to abatements. A person who claims to be aggrieved by the refusal of the Commissioner to abate a tax in whole or in part has the burden of establishing the right to an abatement. Staples v. Commissioner of Corporations and Taxation, 305 Mass. 20, 26 (1940). See also Commissioner of Corporations and Taxation v. Filoon, 310 Mass. 374, 376 (1941); Stone v. State Tax Commission, 363 Mass. 64, 65-66 (1973).

The appellants cite several cases and opinions involving actual or proposed differentiations that in the Court's opinion violated Article 44: Opinion of the Justices to the Senate and the House of Representatives, 266 Mass. 583 (1929), graduated income tax; Daley v. State Tax Commission, 376 Mass. 861 (1978), different rates on ordinary-income and capital-gain parts, for federal purposes, of a lump-sum payment from an employee pension-plan; Opinion of the Justices to the House of

Representatives, 383 Mass. 940 (1981), an income tax computed as a percentage of the federal tax; Salhanick v. Commissioner of Revenue, 391 Mass. 658 (1984), distinction between mining royalties according to the length of time iron ores were held; and Commissioner of Revenue v. Lonstein, 406 Mass. 92 (1989), taxation of interest from savings deposits according to amount.

In Barnes v. State Tax Commission, 363 Mass. 589 (1973), interest was taxed at the rate of 9 percent with certain exceptions, which included interest made in the course of business by pawn-brokers. G.L. c.62 s.4(a)(1)(ii) as then in effect. The excepted interest was subject to tax at 5 percent under G.L. c.62 s.4(b). The trustees of a trust licensed to make small business loans sought a declaratory judgment that although "loans made in the course of business" was a valid classification, the limitation to pawn-brokers created an unreasonable classification and denied equal protection of the laws. In rejecting the trustees' contention that the limitation was

an attempt to classify persons, not the property to be taxed, the Court said: ". . . . the essential distinction is one of the nature of the business and the incidents which characterize the property employed therein. . . . . It may be added that further limitation of the classification, even if described in terms of persons, which reflects actual underlying differences in the property is allowable under the language of art. 44." 363 Mass. 594.

While holding that taxing interest earned by Massachusetts residents on money deposited in non-Massachusetts financial institutions at a higher rate than interest on money deposited in Massachusetts institutions discriminated against interstate commerce, the Court held that collection and verification difficulties shown by affidavits of revenue officials constituted sufficient "actual underlying differences" between Massachusetts and foreign income to give the Legislature discretion to designate their sources as different classes of property for purposes of Article 44. Aronson v.

Commonwealth, 401 Mass. 244, 254 (1987).

All of these cases deal with the propriety of taxing different classes of income from the same source at different rates, not with the reasonableness of exemptions. Assuming, contrary to Barnes and Aronson, that Article 44 would preclude taxing different classes of pensions at different rates, that is not what G.L. c.62 s.2(a)(2)(E) does. That staute grants an exemption, an act that Article 44 authorizes and that cannot be done without distinguishing one class of income from another. The appellants have not shown, as they must, that the distinction between contributory and non-contributory plans is unreasonable.

The board thinks that in the instant appeal, even if it involved a rate distinction rather than an exemption, the essential distinctions between contributory and non-contributory pensions would be the underlying financial structure of the retirement plan and the prior financial transactions between the plan and its members and that these distinctions are "actual

underlying differences" sufficient to justify the Legislature in designating contributory and non-contributory plans as separate classes for purposes of Article 44.

The board's decision for the appellee was promulgated on October 8, 1991. The board refused the appellants' Consolidated Request for Conclusions of Law, numbers 1 through 6. After the publication of the decision of the United States Supreme Court in Barker v. Kansas, supra, the appellants filed a Motion for Reconsideration on May 4, 1992. After hearing, the board denied the motion.

APPELLATE

TAX BOARD

JOHN E. FILIOS & another[1] *vs.* COMMISSIONER OF REVENUE.

Suffolk. May 3, 1993. - July 13, 1993.

Present: LIACOS, C.J., ABRAMS, NOLAN, & LYNCH, JJ.

Taxation, Income tax. *Constitutional Law*, Income tax. *Retirement*.

Discussion of 4 U.S.C. § 111 (1988), which preserves federal employees' immunity from discriminatory State taxation. [807-809]

Evidence before the Appellate Tax Board did not support a claim that the Commonwealth taxes Federal retirees' military pensions in a discriminatory manner in violation of 4 U.S.C. § 111 (1988), where the Federal military retirement system was a noncontributory system and where the distinction between contributory and noncontributory pension schemes for purposes of State income taxation of distributions is a "significant difference" that warrants different tax treatment of the two classes of taxpayers by allowing exclusion from gross income of benefits received from any contributory retirement system, under G. L. c. 62, § 2 (*a*) (2) (E). [809-812]

Evidence before the Appellate Tax Board did not support a claim that the Commonwealth taxes Federal retirees' military pensions in a discriminatory manner in violation of art. 44 of the Amendments to the Massachusetts Constitution, where the Federal military retirement system was a noncontributory system and where the distinction between contributory and noncontributory retirement systems is an "actual underlying difference" that warrants different tax treatment of the two classes of taxpayers by allowing exclusion from gross income of benefits received from any contributory retirement system, under G. L. c. 62, § 2 (*a*) (2) (E). [812]

APPEAL from a decision of the Appellate Tax Board.

The Supreme Judicial Court granted a request for direct appellate review.

Stephen S. Ostrach for the taxpayers.

[1]Eleanor G. Filios.

Douglas H. Wilkins, Assistant Attorney General (*Thomas A. Barnico*, Assistant Attorney General, with him) for the Commissioner of Revenue.

ABRAMS, J. The plaintiff taxpayers appeal from a decision of the Appellate Tax Board (board) denying them an abatement of the State income tax paid on their military retirement compensation.[2] The taxpayers claim that the taxation is discriminatory, in violation of 4 U.S.C. § 111 (1988), and art. 44 of the Amendments to the Massachusetts Constitution. We granted their application for direct appellate review. We affirm the decision of the board.

1. *Violation of 4 U.S.C. § 111.* The board found that the taxpayers were "residents of the Commonwealth who received income from military retirement compensation from the United States, based on the details of their military service . . . . This compensation was included in the federal gross income of each appellant, and thus became part of each appellant's Massachusetts gross income. Each appellant paid the taxes due on the retirement compensation." The board also found that "[t]he military retirement system is a noncontributory system: military personnel do not have a separate, identified amount deducted periodically from their pay and deposited in a segregated retirement fund from which

[2]The notice of appeal stated that "the Appellants, John E. and Eleanor G. Filios, et al., hereby appeal." The body of the notice of appeal does not indicate to whom the "et al." refers. The commissioner challenged the adequacy of the notice of appeal as to Federal military retirees other than Filios and his wife. In *Cummings* v. *City Council of Gloucester*, 28 Mass. App. Ct. 345 (1990), the Appeals Court has interpreted Mass. R. A. P. 3 (c), as amended, 378 Mass. 927 (1979), consistently with the interpretation given the Federal analogue, Fed. R. A. P. 3 (c), in *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988). See also *Rollins Envtl. Servs., Inc.* v. *Superior Court*, 368 Mass. 174, 179-180 (1975) ("[T]he adjudged construction theretofore given to the Federal rules is to be given to our rules, absent compelling reasons to the contrary or significant differences in content"). In *Cummings*, the Appeals Court noted that the United States Supreme Court had ruled that "the term 'et al.' does not satisfy the specificity requirement of Fed. R. A. P. 3 (c), and, unless an appellant is actually named in the notice of appeal, jurisdiction over that party's appeal is lacking." *Cummings* v. *City Council of Gloucester*, *supra* at 347. The only appeal before us is that of John E. and Eleanor G. Filios.

retirement benefits are paid." The board determined that the allowance of an exemption for contributory pension plans did not discriminate against the Federal military retirees.

The taxpayers argue that the Commonwealth treats State and Federal retirement benefits inconsistently and thereby discriminates against them in violation of 4 U.S.C. § 111, which provides: "The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." The United States Supreme Court declared that 4 U.S.C. § 111 is a statute "which preserves federal employees' immunity from discriminatory state taxation." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 807 (1989).

In *Davis*, the United States Supreme Court discussed the congressional purpose in codifying the "nondiscrimination component of the constitutional immunity doctrine which has, from the time of *McCulloch* v. *Maryland*, [17 U.S. (4 Wheat.) 316, 436-437 (1819)], barred taxes that 'operat[e] so as to discriminate against the Government or those with whom it deals.'" *Davis* v. *Michigan Dep't of the Treasury*, *supra* at 812, quoting *United States* v. *Detroit*, 355 U.S. 466, 473 (1958). The Court determined that "the retention of immunity in § 111 is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." *Davis* v. *Michigan Dep't of the Treasury*, *supra* at 813. The Court ruled that the "imposition of a heavier tax burden on [those who deal with one sovereign] than is imposed on [those who deal with the other] must be justified by significant differences between the two classes." *Id.* at 815-816, quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960). Therefore, in analyzing whether inconsistent tax

treatment violates § 111, we must determine whether there are "significant differences between the two classes" of taxpayers. See *Barker* v. *Kansas*, 112 S. Ct. 1619, 1622 (1992), quoting *Davis*, *supra* at 816.

Massachusetts defines gross income as "the federal gross income . . . [deducting] [i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed." G. L. c. 62, § 2 (*a*) (2) (E) (1990 ed.).[3] Thus, the Massachusetts statute exempts from State taxation benefits received through a contributory retirement system. The commissioner states that the pension benefits of the Federal military retirees are taxable, not because the retirees were employed by the Federal government, but because these retirees did not contribute to their pensions.[4] This distinction, the commissioner claims, creates significant differences between the two classes of taxpayers such that differential treatment does not violate 4 U.S.C. § 111.[5] See *Davis* v. *Michigan Dep't of the Treasury*, *supra* at 815. We agree.

[3]General Laws c. 62, § 2 (*a*) (2) (E) (1990 ed.), provides: "Massachusetts gross income shall mean the [F]ederal gross income . . . with the following further modifications: The items to be deducted therefrom are: - Income from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed."

[4]In a technical information release (TIR), the commissioner declared that Federal employees who receive benefits from contributory pension plans are exempt from State tax. TIR 92-3 (Apr. 28, 1992).

[5]In *Barker* v. *Kansas*, 112 S. Ct. 1619, 1622-1623 (1992), the State offered six distinctions between military retirees and State and local government pensioners. One of these was that "the federal military retirement system is noncontributory and funded by annual appropriations from Congress," the argument made here. The Court wrote: "As we read the [Kansas Supreme] court, however, it did not rest its decision on this difference . . . . Moreover, we note that the State applies its income tax to other federal retirees who contributed to their benefits, such as members of the Central Intelligence Agency, Foreign Service, bankruptcy judges, and United States magistrates." *Id.* at 1626 n.5. Thus, the Court did not decide whether the fact a retirement system is contributory would be a significant difference sufficient to satisfy the *Davis* v. *Michigan Dep't of the Treasury* test. In any event, the Kansas State tax system apparently did

The term "contributory" is not defined in the statute. In a technical information release (TIR), the commissioner defined a contributory retirement plan as one "in which amounts contributed to the plan are includible in the Massachusetts gross income of the employee (or would be included in the Massachusetts gross income of the employee if the employee were a Massachusetts resident). Under a noncontributory plan, amounts contributed on behalf of an employee are not included in the gross income of the employee and are therefore not subject to tax at the time of contribution. Thus, taxing distributions from contributory plans can lead to double taxation, while taxing distributions from noncontributory plans will not." TIR 92-3 (Apr. 28, 1992). See Black's Law Dictionary 329 (6th ed. 1990) (A "contributory" pension plan is one "where employees, as well as employers, make payments to a pension fund").

Under G. L. c. 62, § 2 (*a*) (2) (E), the tax treatment of retirement benefits depends on the pension plan. As TIR 92-3 states, employees already have been taxed on the contributions they make to their pensions. Federal employees who contribute to their pensions are not taxed on the benefits received. See note 4, *supra*. There is no violation of 4 U.S.C. § 111.

The taxpayers argue that the distinction between contibutory and noncontributory pensions systems is illusory. They assert that 90% of the State retirement benefits are noncontributory because they come from contributions made by the employees' governmental units. See G. L. c. 32, § 1 (1990 ed.). Therefore, they argue, the complete exemption from taxation of all of the retirement benefits of State and local employees undercuts the commissioner's reliance on that distinction.

not use the distinction between contributory and noncontributory retirement systems in determining whether certain pension benefits would be subject to taxation. See *Barker* v. *Kansas*, *supra* at 1621 n.1.

The Legislature has chosen to exempt pensions to which an employee contributes and has not defined a contributory plan to include a minimum percentage contribution by the employee. See G. L. c. 62, § 2 (*a*) (2) (E). The fact that the State employee contributes only 10% is not sufficient to negate the differential tax treatment between the pension systems.

The taxpayers also note that the noncontributory pensions of certain State and municipal retirees are exempt from State income tax. When the Commonwealth first enacted the State income tax, it exempted the noncontributory pensions of Boston school teachers and all municipal police and fire personnel. See Spec. St. 1917, c. 327; St. 1917, c. 270. Then, in 1973, the Legislature again provided that the pensions received by employees of municipal fire and police departments who were employed before the establishment of the contributory retirement system and who did not choose to join the contributory retirement system, would be exempt. St. 1973, c. 876, § 1. The taxpayers claim that this exemption creates a violation of 4 U.S.C. § 111.

The board found that the "exemptions were enacted in 1917, the year after the imposition of the income tax. In order to be covered by a noncontributory plan whose exemption was confirmed by St. 1973, c. 876, § 1, an employee in the police or fire service of a city or town would have to have been in active service when the contributory system under Chapter 32 was established in 1936 or 1937 and elected not to join it. If any qualifying employees existed during the tax years at issue, it was the responsibility of the appellants to produce evidence of the fact. Because no such evidence was furnished to the board, no finding could be made by the board that the class established by St. 1917, c. 270, and confirmed by St. 1973, c. 876, had any members during the years at issue. Further, the board notes that the active life of a person in the police or fire service would be unlikely to have continued for fifty-five years from 1936, when the municipal retirement plans were made contributory, to 1991. If the class had any members during the years at issue, it is

unlikely that they were numerous, or that they will survive long enough to require legislative action to remove their more favorable treatment or give similar treatment to military retirees." We conclude that the distinction between contributory and noncontributory pensions systems was a valid one for the Legislature to make and for the board to follow.

The Commonwealth does not impose the tax based on the source of the income, see note 3, *supra*; it looks rather to whether the employee contributed to the plan. Contrary to the plaintiffs' argument, that distinction is not illusory. *Davis* does not require a different result. The evidence before the board does not support a claim that the Commonwealth is taxing Federal retirees in a discriminatory manner.

2. *Violation of art. 44.* Article 44 states in part: "Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property." The taxpayers claim that taxing the retirement benefits of State and municipal retirees at a "0% rate" and taxing them at a different rate violates art. 44. We disagree.

"Properties are of the same kind unless there are 'actual underlying differences between them.'" *Commissioner of Revenue* v. *Lonstein*, 406 Mass. 92, 94 (1989), quoting *Salhanick* v. *Commissioner of Revenue*, 391 Mass. 658, 662 (1984). The commissioner satisfied the test for significant differences under *Davis* v. *Michigan Dep't of the Treasury*, *supra*. We hold that the distinction between a contributory retirement system and a noncontributory retirement system is an actual underlying distinction, sufficient to meet the test of *Lonstein*.

The construction advocated by the plaintiffs would favor Federal retirees over State retirees. The legislative distinction between contributory and noncontributory pensions is fair to

all retirees. The decision of the Appellate Tax Board is affirmed.[6]

So ordered.

[6]On Friday, June 18, 1993, the United States Supreme Court issued its opinion in *Harper* v. *Virginia Dep't of Taxation*, 61 U.S.L.W. 4664 (June 15, 1993). That case is inapplicable because its sole issue was that of the retroactivity of the rule announced in *Davis* v. *Michigan Dep't of the Treasury*, *supra*.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

In the case No. SJC-06066

JOHN E. FILIOS & others[1]

vs.

COMMISIONER OF REVENUE

O R D E R

The request to reconsider the plaintiffs' motion to amend the notice of appeal to separately name the 27 individuals consolidated in the trial court is hereby allowed for purposes of seeking review in the Supreme Court of the United States. The docket shall reflect the allowance of the motions. The published opinion of this court will remain unchanged.

By the Court (Abrams, J.).

ENTERED: October 26, 1993

---

[1] Eleanor G. Filios, Herbert L. Cheeseman, Betsy B. Cheeseman, Ralph Cipolla, Doris H. Cipolla, Joseph M. Conroy, Robert C. Davenport, Annetta B. Davenport, Kenneth R. Depperman, Mary E. Depperman, Charles F. DeSmet, Marjorie I. DeSmet, Francis H. Fumia, Dreama F. Fumia, Mack K. Greenberg, Harriet C. Greenberg, Daniel F. Hayes, Dorothy R. Hayes, David J. Mainville, Vern Mainville, Donald G. Smith, Ruth E. Smith, Richard J. Spatafora, Liliane M.J. Spatafora, Russell E. Tracy, Lillian A. Tracy.

(2)

Supreme Court, U.S.
FILED
FEB 11 1994
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No. 93-1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993.

JOHN E. FILIOS, ET AL.,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented.

1. Does a State violate 4 U.S.C. § 111 (prohibiting discriminatory taxation of federal officers and employees), when it taxes income received from state, local and federal non-contributory pensions, and exempts only contributory state, local and federal pensions?

2. Is the petition timely as to John and Eleanor Filios?

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No. 93-1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993.

JOHN E. FILIOS, ET AL.,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the Commissioner of Revenue of Massachusetts submits this brief in opposition to the petition filed by petitioners.

Jurisdiction.

The petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257, to review a final judgment of the Massachusetts Supreme Judicial Court dated July 13, 1993. The application of petitioner John A. Filios to extend time for filing a petition for a writ of certiorari was denied by Justice Souter on October 15, 1993. On October 26, 1993, the Supreme Judicial Court granted the petitioners' motion to amend their notice of appeal to separately name petitioners in

addition to John A. Filios. The petition for a writ of certiorari was served on or about November 17, 1993, more than 90 days after the Supreme Judicial Court's original judgment, but within 90 days of the same Court's October 26 Order. On January 18, 1994, the Clerk sent notice that this case was docketed on November 22, 1993.

Statutory Provisions Involved.

In addition to 4 U.S.C. § 111, cited in the petition for a writ of certiorari, the following sections of the Massachusetts General Laws are involved:

Mass. Gen. Laws c.62, § 2(a):

> Massachusetts gross income shall mean the federal gross income . . . with the following further modifications:—
>
> (1) The items to be added thereto are:—
>
> * * *
>
> (I) Amounts contributed on behalf of the taxpayer pursuant to [the state and municipal pension statute], subdivision (10) of section twenty-two of chapter thirty-two or pursuant to [the judges retirement statute], paragraph (i) of section sixty-five D of said chapter thirty-two and not included in the federal gross income . . . .
>
> (2) The items to be deducted therefrom are:—
>
> * * *

> (E) Income from any contributory annuity, pension, endowment, or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed.

Statement.

Massachusetts General Laws c. 62, § 2(a)(2)(E) exempts from the Massachusetts income tax "[i]ncome from any *contributory* annuity, pension, endowment or retirement fund *of the United States government* or the Commonwealth or any political subdivision thereof, to which the employee has contributed." *Id.* (emphasis added). It is undisputed that this exemption benefits all state *and federal* retirees who receive income from "contributory" pension funds. It is also undisputed in this appeal that the military pensions at issue are not "contributory" pensions. Pet. App. A-3. The issue in this case is whether the Massachusetts income tax imposed on pensions received by military retirees nevertheless discriminates against federal officers and employees, in violation of 4 U.S.C. § 111.

Statement of Facts.

Petitioners ("the taxpayers") are all residents of the Commonwealth who received income from the United States military retirement benefits for some or all of the Massachusetts tax years 1985 to 1988. Pet. App. A-45 The amount of income received by each taxpayer was "based on the details of their military service." *Id.* The taxpayers and the Commis-

sioner stipulated below that the United States "military retirement system is a non-contributory system: military personnel do not have a separate, identified amount deducted periodically from their pay and deposited in a segregated retirement fund from which retirement benefits are paid." *Id.* All of the taxpayers paid Massachusetts income taxes on their income from their military pensions. *Id.*

The taxpayers filed applications for abatement of income taxes paid during the tax years 1985, 1986, 1987 and 1988. See Mass. Gen. Laws c. 62C, § 37. In response to a request for an opinion submitted by various military organizations, the Commissioner issued a ruling on February 16, 1989, that military retirement benefits are taxable income under G.L. c. 62 because they are includable in federal gross income and not "contributory" within the exemption established by G.L. c. 62, § 2(a)(2)(E). Pet. App. A-4, A-46.

On March 28, 1989, this Court issued its decision in *Davis* v. *Michigan Department of the Treasury*, 489 U.S. 803 (1989). On May 10, 1989, the Commissioner issued "Technical Information Release 89-6." Pet. App. A-5. See 830 Code of Massachusetts Regulations (C.M.R.) § 62C.3.1(7) (1988 ed.). The Commissioner opined that "[a]ny federal retirement income is exempt from Massachusetts tax if the system is contributory and the employee actually contributed." Joint Appendix in the Massachusetts Supreme Judicial Court at 29.

At various times in late 1989 and 1990, the Commissioner denied each of the applications for abatement filed by the taxpayers. Pet. App. A-7. The taxpayers appealed to the Massachusetts Appellate Tax Board, which upheld the Commissioner's decision. Pet. App. A-2. See Mass. Gen. Laws c. 62C, § 39; c. 58A, § 7.

On July 13, 1993, the Supreme Judicial Court of Massachusetts affirmed the Board. *Filios* v. *Commissioner of Revenue*, 415 Mass. 806, 615 N.E.2d 933 (1993), Pet. App. A-44 to 51. The Court agreed with the Commissioner and the Board that the distinction in Massachusetts tax law between contributory and non-contributory pensions "creates significant differences between the two classes of taxpayers such that differential treatment does not violate 4 U.S.C. § 111." Pet. App. A-47. It concluded "that the distinction between contributory and noncontributory pensions systems was a valid one", which did "not impose the tax based on the source of the income" and was not discriminatory. *Id.*, A-50. The Court also ruled that, due to a defect in the notice of appeal, "[t]he only appeal before us is that of John E. and Eleanor G. Filios." *Id.*, A-45, n.2.

On October 12, petitioner John E. Filios (but not Eleanor G. Filios) filed in this Court an application to extend the time to file a petition for a writ of certiorari. The application was denied by Justice Souter on October 15, 1993.

On October 26, the Supreme Judicial Court of Massachusetts granted the petitioners' request to reconsider their motion to amend the notice of appeal to name separately 27 [sic] individuals not named in the notice of appeal (i.e. all parties other than John Filios). Pet. App. A-52. The petition for a writ of certiorari was served on or about November 17, 1993.

Summary of Reasons for Denying Petition.

1. There is no conflict among Circuit Courts, State Courts or decisions of this Court. Nor does any tension exist between Massachusetts' taxation of pensions and the non-discrimination principles of 4 U.S.C. § 111. Massachusetts taxpayers may deduct income from federal (as well as state and local) pensions for state income tax purposes, if the pension plan is contributory and the taxpayer has contributed to the plan. Massachusetts does not discriminate because of the source of the income; it distinguishes solely between contributory and non-contributory plans.

2. The factual record here fails to sustain a claim under §111, let alone present any issue of national significance. Petitioners cite a "grandfather clause" solely in Massachusetts law for persons allegedly now living, if any, who were employed as police and fire employees in Massachusetts in the mid-1930's who elected not to join the contributory system enacted at that time. They failed, however, to prove that any living person was benefiting from that clause. Similarly, their argument that Massachusetts' state pension system is 10% contributory merely shows that, like any contributory system, the Massachusetts plan involves contributions by the employer as well as employees. Nothing in this arrangement shows any discrimination against federal pensioners, whose proportionate contribution is not even shown in the record.

Reasons for Denying Petition.

Under Supreme Court Rule 10, "review on Writ of Certiorari is not a matter of judicial right but of judicial discretion," and "will be granted only where there are special and important reasons therefor." The purpose of certiorari writs is to permit the Court to select cases of "such gravity and general importance" as to warrant full court review. *In Re Woods*, 143 U.S. 202, 206 (1892). For the reasons stated below, the petition does not satisfy the criteria that guide the Court's discretion to review a case. Accordingly, the petition should be denied.

I. THE COMMONWEALTH'S TAX STATUTES CONFORM TO FEDERAL ANTI-DISCRIMINATION STATUTES.

In the conceded absence of a conflict between decisions of the Courts of Appeals, State Courts, or this Court, the only question is whether petitioners have raised an issue of national importance. Their sole argument to that effect is based upon alleged violation of 4 U.S.C. § 111.

The question under 4 U.S.C. § 111 is whether the Massachusetts system discriminates against the plaintiff taxpayers "because of the source of the pay or compensation." This clause codifies the nondiscrimination component of the federal constitutional doctrine of intergovernmental tax immunity, which "barred taxes that 'operat[e] so as to discriminate against the Government or those with whom it deals." *Davis*, 489 U.S. at 812 (quoting *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958)).

During the tax years at issue in this appeal, Massachusetts

permitted the deduction from gross income of payments received from any contributory "retirement fund of the United States government". Massachusetts thus permits deductions not only by state contributory retirees, but also by "federal retirees who contributed to their benefits, such as members of the Central Intelligence Agency, Foreign Service, bankruptcy judges and United States magistrates." See *Barker* v. *Kansas*, 112 S.Ct 1619, 1626, n.5 (1992). See also Mass. Dept. of Rev. Letter Ruling 83-38, reprinted in Official MassTax Guide, Personal Income Tax, p. 592 (West 1992)(exemption for contributory annuity received by civilian employee of the Army and Air Force Exchange Service); Joint Appendix in the Massachusetts Supreme Judicial Court at 39 (plaintiffs acknowledge that certain federal civil service retirement benefits are exempt from Massachusetts taxation).

A tax on non-contributory pensions, combined with an exemption for contributory pensions, does not discriminate against the federal government or its employees. Contributory federal pensions receive the same treatment as contributory state pensions. G.L. c. 62, §§2(a)(1)(I). This fact pattern does not bring this case within recent decisions of this Court striking down state taxation laws. Neither of the cases cited by petitioner involved a consistently-applied distinction between contributory and non-contributory pensions, regardless of their source. *Davis*, 489 U.S. at 805; *Barker*, 112 S.Ct. at 1626, n.5.

Davis, 489 U.S. at 816, and *Barker*, 112 S.Ct. at 1622, held that States may lawfully tax pensions differently if there are "significant differences" between the pensions. A retiree who contributed to a pension plan paid consideration and has her own money funding the system, while a non-contributory

retiree does not. In practice, in Massachusetts, there is an additional difference, namely the exposure of the employee's contributions to state taxation at the time of the contributions, through inclusion in Massachusetts gross income. If "significant differences" do not include distinctions based upon employees' payment of consideration to the employer's pension fund and payment of state income tax, then it is hard to imagine what differences might be considered significant enough to warrant different treatment of classes of pensions. At the very least, "[p]rinciples of federalism" require Congress to speak more clearly than it has here, if it intended to set such novel and strict "limits upon the taxation authority of state government, an authority [the Supreme Court has] recognized as central to state sovereignty." See *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, ___ U.S. ___, 62 U.S.L.W. 4097, 4100 (Jan. 24, 1994).

In short, unlike Michigan and Kansas, Massachusetts exempts all federal contributory pensions from state taxation. Since state and federal contributory systems are treated equally, as are non-contributory systems, there is no discrimination or inconsistent treatment, and § 111 does not come into play. See *Werner Machine Co., Inc.* v. *Director of Division of Taxation*, 350 U.S. 492, 493-94 (1956)("Since the tax remains the same whatever the character of the corporate assets may be, no claim can be sustained that this taxing statute discriminates against the federal obligations."). *Doneski* v. *Comptroller of the Treasury*, 91 Md. App. 614, 605 A.2d 649, 656 (1992), *cert. denied*, 327 Md. 523, 610 A.2d 796 (1992), *cert. denied*, 113 S. Ct. 981 (1993).

II. THE PETITIONERS' ATTACKS ON THE MASSACHUSETTS TAX SYSTEM DO NOT INVOLVE QUESTIONS OF NATIONAL IMPORTANCE AND RAISE ISSUES OF STATE LAW UPON AN INADEQUATE FACTUAL RECORD.

1. The taxpayers assert (Pet. at 12-13) that Massachusetts' system is not contributory because the benefit levels are, allegedly, funded 90 percent by the state and approximately 10 percent by employee contributions. This argument appears to depend upon splitting the state benefits into two components—one contributory and one non-contributory. But state law, as applied by the Supreme Judicial Court in this case, treats the entire benefit package as one pension. To the extent that petitioners argue otherwise, they are merely disagreeing with the state's highest Court on an issue of state law.

The Commonwealth's approach, in any event, is consistent with the usual understanding of the phrase "contributory" pension, in which "employees, *as well as employers*, make payments to a pension fund". Black's Law Dictionary (6th ed.), p. 329 (emphasis added). See generally 29 U.S.C. §§1054(c), 1056(c)(ERISA provisions contemplating employer contributions); Canan, *Qualified Retirement and Other Employee Benefit Plans*, § 3.51, pp. 135-136 (West 1992).

Under the state law definition of contributory plan set forth in the Commissioner's Technical Information Release ("TIR") 92-3 and endorsed by the petitioners below (though not in this Court, see Pet. at 15), the question is whether employee contributions are included in Massachusetts gross income. Massachusetts *does* include the pension plan contributions of its state and local employees in gross income for state tax purposes. Mass. Gen. Laws. c. 62, § 2(a)(1)(I), quoted above, p. 2.

The state taxation system under attack here thus treats the contribution consistently as being paid from the state and local employees' income. Petitioners concede as much (Pet. at 14 and n. 11). The fact and degree of participation by the employer in funding benefits therefore is irrelevant.

The petitioners also offer no evidence that all federal retirement benefits are funded 100 percent by employee contributions, nor do they discuss in any way the degree of employee contribution or other features of federal contributory pension plans. This failure of proof is fatal to their contention that federal pensions are treated differently from state pensions. Such a fact-bound issue is not appropriate for Supreme Court review.

In short, the petitioners have not provided any basis for disregarding the fact, found by the Board, that the exempt state (and local) pensions are contributory, and their pensions are not.

2. Petitioners also argue that there exists an obscure exemption for certain police and fire employees, if any, whose employment predated the 1930's and 1940's. It is an enormous stretch for petitioners to call this a "state policy" of exemption. Indeed, petitioners' virtual concession that they cannot show an "active and significant class" of exempt retirees, even in Massachusetts (Pet. at 10-11), leads directly to the conclusion that this issue is not "significant", let alone one of national importance such as to warrant review by this Court.

The state provision in question exempts from taxation any pension received on account of service by local "police and fire department" employees who were so employed before establishment of the contributory retirement system *and* who did not elect to join the contributory retirement system. Mass. St.

1973, c. 876, § 1. This provision is a "grandfather clause" for police and fire employees whose employment predated the state legislation in the 1930's and 1940's that made all public retirement systems mandatory. There is no claim that such a provision exists in other States.

Petitioners' attempt to base their serious charge of discrimination upon this trivial exception fails for lack of proof. The Massachusetts Appellate Tax Board noted correctly that "[i]f there were enough [qualifying members of local police and fire departments] surviving in 1973 to justify continuing the exemption (St. 1973, c. 876, s.1), there was no evidence [that] even a few of them are still taking advantage of the exemption." Pet. App. A-35. The petitioners respond only with speculation that "only a limited number of retirees may still benefit" from the exemption. (Pet. at 11). In the absence of any evidence of current exempted retirees, there was simply no proof of discrimination, and there is no record support for petitioners' claims in this Court, much less any indication of an issue of national importance.

More generally, the petitioners do not argue that the system of *exemption* for contributory pensions is in any way under- or over-inclusive. They only argue that *taxation* of non-contributory pensions is very minimally under-inclusive. The validity of state law must turn upon the overriding and overwhelming effect of the law as a whole, that is, "the generality of cases, not the rare exceptions." See *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976)(discussing constitutional procedural due process analysis); *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975)(evaluating federal legislation under the rational basis

test)[1].

In short, petitioners' claims failed in state court for simple lack of proof, not for any legal reason raising issues of national importance warranting review by this Court.

III. THE PETITION IS UNTIMELY, AT LEAST AS TO JOHN AND ELEANOR FILIOS.

John E. and Eleanor G. Filios were parties to the Supreme Judicial Court's decision, issued on July 13, 1993. *Filios*, 415 Mass. at 807 n.2, 615 N.E.2d at 933 n.2, A-45 n.2. These two parties, at least, had a right to apply for certiorari for 90 days thereafter, until October 9, 1993, pursuant to Supreme Court Rule 13. John, but not Eleanor, Filios applied for an extension of time to file the petition, which was denied by Justice Souter on October 15, 1993. While the Massachusetts Supreme Judicial Court's order allowing the motion to amend the state court notice of appeal arguably gave other parties 90

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[1] Moreover, the Commonwealth need not justify its entire system of taxing pensions, since the taxpayers here cite, as alleged proof of discrimination, only the exemption for certain "grandfathered" police and fire employees, if any survive. It is enough, therefore, if the Commonwealth can justify the grandfather clause. The purpose of this grandfather clause is obviously to protect the expectations of certain local employees who had entered the public service with the understanding that their non-contributory pension would not be taxed by the state. Such a purpose meets even the heightened scrutiny for gender-based classifications under the Federal Equal Protection Clause. See *Heckler v. Mathews*, 465 U.S. 728, 744-48 (1984). The rationale upholding "grandfather" provisions under intermediate scrutiny for gender-based distinctions applies *a fortiori* to this case, which involves the less searching standard: whether the differences between taxable and exempt pensions are "significant."

days to file a petition for certiorari, it cannot be held to have extended the time for the two original parties, John and Eleanor Filios. Their petition, filed on November 22, was untimely.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Date: February 11, 1994

(3)

No. 93-1145

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOHN E. FILIOS, *et al.*,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

BRIEF *AMICUS CURIAE* ON BEHALF OF THE MILITARY COALITION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Commonwealth of Massachusetts' policy of requiring federal military retirees to pay state income tax on their military retirement benefits while it completely exempts from state tax the retirement benefits of state and municipal retirees violate 4 U.S.C. § 111 which prohibits states from taxing federal employees in a discriminatory fashion?

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BRIEF AMICUS CURIAE ON BEHALF OF THE MILITARY COALITION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Pursuant to Rule 37.2 of this Court, The Military Coalition (herein "TMC") respectfully submits this brief as *amicus curiae*.[1] TMC is a voluntary association of 24 military-related organizations which was formed six years ago. App. A, 1a. Collectively its constituent organizations represent the interests of over 1,900,000 members, who are retired, reserve and active members of the Uniformed Services of the United States. TMC is dedicated

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[1] *Amicus* has received the written consents of the parties to the filing of this brief; those consents have been filed with the Clerk of the Court.

to the purpose of providing a cohesive means for the study and advocacy of issues which impact upon the maintenance of a strong national defense and the preservation of rights and benefits its varied constituents have earned through years of dedicated service to the United States.

Despite this Court's unequivocal mandates in *Barker v. Kansas*, —— U.S. ——, 112 S. Ct. 1619 (1992), *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 US. 376 (1960), the Commonwealth of Massachusetts continues to refuse to give effect to this Court's decisions as the controlling statement of federal law. The resolution of the question presented in this case—whether a state court may engraft an exception to the rule of nondiscrimination under the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, for retired military members—is vitally important to *amicus*. If the decision below is permitted to stand, military retirees and, indeed, military members on active duty throughout the fifty states will be at risk that rights established by Congress may be arbitrarily abridged by any state solely on the basis of local political considerations. *Amicus* has supported the enactment of several measures by Congress which prohibit discrimination of the type upheld by the decision below. Thus, *amicus* has a unique perspective on the question presented by this case as well as a vital interest in its proper resolution.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Judicial Court of Massachusetts presents a question of far-reaching importance: whether a state court may engraft an exception to the rule of nondiscrimination under the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, for retired members of the armed forces? The decision of the court below that it was at liberty to create an

exception where Congress has declined to do so conflicts with the decisions of this Court and the will of Congress. Such a result, if permitted to stand, threatens grave harm to substantial federal interests. As this Court has recognized, matters implicating the national defense are exclusively the province of Congress.

Amicus respectfully submits that this Court should grant the petition in this case to correct the erroneous result of the court below on an issue involving the important concern of national defense. *See* U.S. Const., Art. I, § 8, Cls. 12, 13 and 14.

If there should be any doubt as to the need for certiorari, *amicus* requests that the Court seek the views of the Solicitor General of the United States because of the important federal interests implicated in the decision below.

1. The decision of the Supreme Judicial Court of Massachusetts conflicts with the holdings of the Court in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) and *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960). If permitted to stand, the result in this case will be an invitation to the states to eviscerate the holdings of these decisions and render the doctrine of intergovernmental tax immunity meaningless.

In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court construed the "plain language" of 4 U.S.C. § 111 and concluded that the "statute leaves no room for doubt" that federal retirement benefits "are subject to § 111." *Id.* at 808. In resolving the question of the validity of the Michigan Income Tax Act, this Court held that "the relevant inquiry is whether the inconsistent tax treatment is *directly related to*, and *justified* by, 'significant differences between the two classes.'" *Id.* at 816 (emphasis added) (citation omitted). However, in resolving the issue of whether Massachusetts may discriminate in favor of its own retirees and against military retirees,

the court below ignored the *Davis* test. *See Filios v. Commissioner of Revenue*, 415 Mass. 806, 810, 615 N.E.2d 933 (1993).

Neither the lower court's opinion nor the position of the State demonstrates how the differential treatment of military retirees is "based on" the alleged differences between the two classes. *See Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 384 (1960); *Davis*, 489 U.S. at 816-17. The only distinguishing factor set forth in Massachusetts' exemption provisions is the source of the compensation. There is no evidence of any kind which establishes that the Massachusetts legislature intended to single out military retired pay for discrimination because of any actual or perceived differences from other forms of retirement income. The court below based its decision *solely* on the *post hoc* rationalization of the respondent. However, such a rationalization is legally insufficient to permit a state to discriminate against military retired pay.

The court below held that Massachusetts' discriminatory scheme was justified because of the noncontributory nature of the military retirement system.[2] The court below adopted the position of the respondent that the discriminatory tax treatment of retirement benefits was "depend[ent] on the pension plan" and that members of the favored state class have already "been taxed on the contributions." *Filios*, 415 Mass. at 810. This conclusion is untenable.

Contrary to the conclusion of the court below and the position of the respondent in this case, Massachusetts law, independent of the provisions of this discriminatory scheme, provides protections to prevent the imposition of tax upon retirement benefits attributable to employee con-

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[2] As the Solicitor General poignantly noted in *Barker*, Congress' decision to fund military retired pay out of general revenues rather than annual contributions "is no concern of state tax policy . . . ." *See* Brief For The United States As Amicus Curiae In Support Of Petitioners, at 23 n.34, *Barker v. Kansas*, No. 91-611 (1992).

tributions that have been taxed at the time of contribution. Certainly the respondent knows this. For example, the instructions to the 1993 Massachusetts Resident Income Tax Form 1, at 8, clearly state that pensioners are to "[s]ubtract from [their taxable] income the amount of [their] contributions which were previously taxed by Massachusetts until the total of [their] taxed contributions are received." App. F, 21a. Thus, in the first instance, it is clear that the proffered rationale for the source based discrimination at issue in this case does not exist in fact.

In addition, the court's conclusion that the members of the favored state class "have already been taxed on [their] contributions" is tenuous at best. Under the discriminatory scheme in issue, some members of the favored state and local class of retirees were never taxed at all at the time their contributions were made and are not subject to tax on any of their retirement benefits. *See, e.g.*, Letter Ruling 1987-8, App. D, 14a-15a.

Similarly, many of the remaining members of the favored state and local class have likewise never been subject to tax on either their contributions or their retirement benefits. Massachusetts provides a deduction for tax purposes of $2,000 for *employee* contributions to contributory pension plans. *See* G.L.c. 62, § 3(B)(a)(4).[3] The balance of the favored state and local class has similarly paid little or no tax on their contributions to the plan by virtue of this same provision. *Id.*

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[3] The statute provides in relevant part:

> (a) There shall be deducted from the Part B adjusted gross income in determining the Part B taxable income:
>
> * * * *
>
> (4) All sums *deducted* from wages as *contributions* to any annuity, pension, endowment or retirement fund of the United States government, the commonwealth or any political subdivision thereof, provided, that the deduction for such contributions and the deductions otherwise allowable under subparagraph (3) hereof attributable to any one taxpayer shall not in the aggregate exceed two thousand dollars . . . .

Moreover, if there were any doubt as to the source based discrimination of Massachusetts' scheme, it is readily demonstrated by the scheme's operative effect as to retirees of states other than Massachusetts. Retirees of other states' public employee retirement systems are entitled to the discriminatory exemption, not based on whether their contributions were previously taxed by either Massachusetts or their former state, but *solely* on the source of the payor state. If the payor state exempts Massachusetts' public employee retirement income from taxation, then the payor state's public employee retirement income is exempt in Massachusetts. *See* Technical Information Release 1989-10, App. C, 11a-12a. On the other hand, if the other state does not exempt Massachusetts public employee retirement income, then the other state's public employee retirement income is taxed in Massachusetts, irrespective of whether there has been prior taxation of the *employee* contributions. *See* Letter Ruling 1985-12, App. B, 8a.

Finally, the rationale of the court below is foreclosed in all events by *Davis*. Massachusetts retirement benefits are funded not only through *employee* contributions, but also through government *employer* contributions and pension fund investments. *See, e.g.*, Pet. at 12-13. Yet, Massachusetts does not tax, at *any* time, these *employer* contributions and pension fund investments. However, the court below justified the State's taxation on the *full* measure of military retired pay on the basis that *part* of the benefits received by state and local employees—the sum attributable to *employee* contributions—had been previously taxed. *Filios*, 415 Mass. at 810.[4] *See also* Technical Information Release 1992-3, App. E, 20a.

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[4] Of course, as demonstrated above, the conclusion that *employee* contributions have been *fully* taxed in the first instance is not true. *See, e.g.*, Letter Ruling 1987-8, *supra*; G.L.c. 62, § 3(B)(a)(4), *supra*, n.3.

Examining Massachusetts' scheme, it is clear that the "State's articulated rationale is not in fact the basis for the disparate treatment, but only a cloak for discrimination against federally funded benefits." *Barker v. Kansas*, —— U.S. ——, 112 S. Ct. 1619, 1626 (1992) (citation omitted). As this Court recognized in *Davis*, a "tax exemption truly intended to account for differences in [the taxation for the funding of] retirement benefits would not discriminate on the basis of the source of those benefits, as [Massachusetts'] statute does; rather it would discriminate on the basis of the amount of benefits received by individual retirees [which were previously taxed]." *Davis*, 489 U.S. at 817. Accordingly, for purposes of 4 U.S.C. § 111, it is obvious that Massachusetts' proffered rationale fails "because an evenhanded application of the rationale would have resulted in inclusion of [virtually all state retirees] in the disfavored class." *Id.*

Under the doctrine of intergovernmental tax immunity, "the State [must] treat those who deal with the Government as well as it treats those with whom it deals itself." *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960). Consistent with this doctrine, 4 U.S.C. § 111 prohibits the discriminatory state taxation of "salaries, retirement benefits, and other forms of compensation . . . on account of the source of the compensation." *Davis*, 489 U.S. at 810. Nothing in the doctrine of intergovernmental tax immunity or the statute differentiates between military retirees and other retired employees. *Barker v. Kansas*, —— U.S. ——, 112 S. Ct. 1619 (1992).

As this Court recognized in *Davis*, "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Davis*, 489 U.S. at 815 n.4. In the instant case, the court below acted impermissibly when it failed to scrutinize the respondent's *post hoc* rationalization for the discrimination.

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers, such as the petitioners, are relegated exclusively to state courts to press their claims for relief. But it is state courts that have demonstrated the greatest difficulty in recognizing this Court's decisions as the "controlling statement of federal law." *Harper v. Virginia Dep't of Taxation*, —— U.S. ——, 113 S. Ct. 2510, 2515 (1993). This Court is the only federal court that can hear the retirees' claims. Review by this Court is thus necessary to assure a correct and evenhanded application of this Court's decisions. Absent review by this Court, "[t]he State too easily avoids its responsibilities . . . [for its] noncompliance with federal law." *Green v. Mansour*, 474 U.S. 64, 81 (1985) (Blackmun, J., dissenting).[5]

2. Review by this Court is also necessary to resolve the conflict among the state courts of last resort regarding what is sufficient to satisfy the "significant differences" standard of *Davis*, 489 U.S. at 816, and *Phillips*, 361 U.S. at 383-385. Contrary to the decision below, the Supreme Court of Montana has recently held that in order to satisfy the requirements of *Davis*, the State must demonstrate that the disparate treatment is directly related to, and justified by, significant differences between the two classes. *See Sheehy v. Montana Dep't of Revenue*, 864 P.2d 762 (Mont. 1993) (*Sheehy II*). The Montana Supreme Court recognized that the State's "desire" to maintain an advantage for its own retirees is inadequate under *Davis*. In invalidating Montana's legislative response to *Davis*, the court recognized that discriminatory schemes cannot

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[5] In stark contrast to the decision below, in those rare circumstances where federal courts have been able to exercise jurisdiction, there has been no difficulty in providing taxpayer relief for unconstitutional state taxes which violate the doctrine of intergovernmental tax immunity. *See, e.g., United States v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 2888 (1991).

evade the requirements of federal law by merely "denominat[ing] [them] otherwise."

Thus, absent review by this Court, the requirements of the doctrine of intergovernmental tax immunity will continue to be subject to differing standards in different states. In Montana, *post hoc* rationalizations are insufficient to demonstrate that inconsistent tax treatment is directly related to and justified by significant differences between the two classes. In Massachusetts, it appears that any articulated rationale, even where it is not the basis for the disparate treatment, is sufficient to justify discriminatory taxation of those who deal with the federal government.[6] Review by this Court is necessary to assure that there is but one standard for determining whether inconsistent tax treatment is justified.

[6] *See also Kerr v. Waddell*, No. 1 CA-TX 92-0010, *appeal pending* (Az. Ct. App.). In *Kerr*, the Arizona Tax Court held that Arizona's tax scheme, which discriminates in favor of *current* state employees and against *current* federal employees, was valid in part based on the State's illusory assertion that the State's adoption of the federal definition of adjusted gross income created significant differences for purposes of state taxation between the two classes. However, as this Court has recognized in an analogous context, "[t]he adoption of the federal system in whole or in part, however, cannot shield a state tax statute from . . . scrutiny." *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, —— U.S. ——, 112 S. Ct. 2365, 2372 (1992).

CONCLUSION

Contrary to the decisions of this Court in *Phillips* and *Davis*, the court below utilized a "cloak for discrimination," *Barker*, 112 S. Ct. at 1626, to justify a result which violates the express will of Congress. *Amicus* respectfully urges that the petition for a writ of certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts should be granted and that the decision below should be reversed.

Respectfully submitted,

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February 11, 1994

APPENDIX A

MEMBERS OF THE MILITARY COALITION

THE RETIRED OFFICERS ASSOCIATION (TROA)

The Retired Officers Association was founded in 1929 and has approximately 395,000 members. Membership in the Association is open to all past and present, active, reserve and retired commissioned and warrant officers in any of the seven uniformed services. The organization's mission is to support strong national defense and to represent membership on retirement and benefit issues before Congress.

AIR FORCE ASSOCIATION (AFA)

The Air Force Association was founded in 1946 and has approximately 200,000 members. Membership is open to anyone who has served in the U.S. armed forces. Other American citizens may affiliate as patrons. The organization's mission is to promote public understanding of aerospace issues and national security requirements to ensure strong support of the nation's defense and the men and women who serve in the U.S. Air Force.

AIR FORCE SERGEANTS ASSOCIATION (AFSA)

The Air Force Sergeants Association was founded in 1961. It has approximately 165,000 members and is composed of active and retired enlisted personnel in the Air Force, Air National Guard, Air Force Reserve, Army Air Corps and Army Air Force. Its members belong to 198 chapters throughout the world and the purpose of the organization is to serve as the voice of Air Force enlisted service members.

ASSOCIATION OF MILITARY SURGEONS OF THE UNITED STATES (AMSUS)

The Association of Military Surgeons of the United States received its Congressional Charter in 1908. Its

membership consists of 17,000 members and is open to all past and present commissioned officers or GS-9 and above civilians in the medical services of the United States Air Force, the United States Air Force Reserve, the United States Army, the United States Army Reserve, the Air National Guard, the Army National Guard, the United States Public Health Service and the Veterans' Administration; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. The purpose of the Association is to improve the nation's federal health care system.

ASSOCIATION OF U.S. ARMY (AUSA)

The Association of U.S. Army was founded in 1950 and has approximately 135,000 individual and 250 industrial members. Membership is open to all active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION, U.S. COAST GUARD (CW & WOA)

The Chief Warrant and Warrant Officer's Association was founded in 1929 and has approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

COMMISSIONED OFFICERS ASSOCIATION OF THE U.S. PUBLIC HEALTH SERVICE, INC. (COA)

The Commissioned Officers Association of the U.S. Public Health Service was founded in 1937 and has approximately 7,500 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. The

purpose of the organization is to ensure that the interests and welfare of commissioned officers of the USPHS are protected.

ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE U.S. (EANGUS)

The Enlisted Association of the National Guard of the U.S. was founded in 1962 and has approximately 67,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

FLEET RESERVE ASSOCIATION (FRA)

The Fleet Reserve Association was founded in 1922. It has approximately 170,000 members who are active duty, retired enlisted personnel and commissioned officers with prior service in the Navy, Marine Corps and Coast Guard. The Association is chartered under the laws of Pennsylvania and its purpose is to represent its members on military personnel legislative matters before Congress.

MARINE CORPS LEAGUE (MCL)

The Marine Corps League was founded in 1923 and has approximately 40,000 members. Membership is open to those who served in the Marine Corps. The organization's mission is to preserve the traditions, to promote the interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

MARINE CORPS RESERVE OFFICERS ASSOCIATION (MCROA)

The Marine Corps Reserve Officers Association was founded in 1928 and has approximately 5,700 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

NATIONAL ASSOCIATION FOR UNIFORMED SERVICES/SOCIETY OF MILITARY WIDOWS (NAUS/SMW)

The National Association for Uniformed Services/ Society of Military Widows was founded in 1968 and has approximately 155,000 members. NAUS/SWM membership is open to all active, retired and former members of the uniformed services, their families and survivors. The association's mission is to represent members' interests by supporting legislation that upholds the security of the United States, sustains the morale of the uniformed services and provides fair and equitable consideration for all.

NATIONAL GUARD ASSOCIATION OF THE UNITED STATES (NGAUS)

The National Guard Association of the U.S. was founded in 1878 and has approximately 54,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.

NATIONAL MILITARY FAMILY ASSOCIATION (NMFA)

The National Military Family Association was founded in 1969 and has approximately 10,000 members. Mem-

bership is open to active duty, retired and reserve component members of the seven uniformed services and their family members. The association's mission is to serve as an advocate for uniformed service families and to educate and inform them concerning issues affecting their lives.

NAVAL ENLISTED RESERVE ASSOCIATION (NERA)

The Naval Enlisted Reserve Association was founded in 1957. It has 15,000 members and its membership is open to active, inactive, and retired enlisted reservists in the Navy, Marine Corps and Coast Guard. The Association's mission is to focus on members' interests, morale and well-being, and readiness and training of sea service reserve forces.

NAVAL RESERVE ASSOCIATION (NRA)

The Naval Reserve Association was founded in 1954 and consists of 25,000 members. Membership in the Naval Reserve Association is open to active, inactive and retired Naval Reserve officers and its purpose is to maintain and strengthen the nation's defense by ensuring a continued strong Navy and Naval Reserve.

NAVY LEAGUE OF THE UNITED STATES (NLUS)

The Navy League of the United States was founded in 1902 and has approximately 68,000 members. Membership is open to civilians, military reservists and retirees. The league's mission is to maintaian a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES (NCOA)

The Non Commissioned Officers Association of the United States is a patriotic, civic and fraternal organiza-

tion operating under Texas Corporate Charter. The Association was founded in 1960 and has more than 160,000 members. Its membership consists of active, reserve, retired or veterans of the United States armed forces in the grades E-4 thru E-9. The purpose of the Association is to promote and protect the rights and benefits of active duty and veteran non commissioned officers and petty officers in all five branches of the armed forces and provide opportunities for them to join in patriotic, fraternal, social and benevolent activities.

RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES (ROA)

The Reserve Officers Association of the United States was organized in 1922, and chartered by Congress in June 1950. Originally, the Reserve Officers Association consisted solely of Army Officers, Reserve Officers, National Guard Officers, and Retired Officers. Following World War II, the Reserve Officers Association expanded its membership to all services and it now has approximately 100,000 members. The purpose of the Association is to ensure an adequate total force of all services including both active and reserve components, and a force that is mobilization ready to meet any contingency.

THE JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA (JWV)

The Jewish War Veterans of the United States was founded in 1896 and has approximately 100,000 members. Membership is open to veterans of war time service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

THE MILITARY CHAPLAINS ASSOCIATION (MCA)

The Military Chaplains Association was founded in 1925 and chartered by the 81st Congress in 1950. It has approximately 1,300 members. Membership is open to all

chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and to deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces; to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

THE RETIRED ENLISTED ASSOCIATION (TREA)

The Retired Enlisted Association was founded in 1968 and consists of 68,000 members. Its membership is made up of enlisted retirees from all branches of the armed services and their surviving spouses. The mission of the association is to represent retired enlisted personnel and protect retiree military benefits.

U.S. ARMY WARRANT OFFICERS ASSOCIATION (USAWOA)

The U.S. Army Warrant Officers Association was founded in 1973 and has 9,000 members. Its members consist of National Guard, active duty, reserve and retired Army warrant officers. The purpose of the association is to recommend improvement of the Army, and promote technical and professional information among warrant officers.

U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION (CPOA)

The U.S. Coast Guard Chief Petty Officers Association was founded in 1969. Its 11,600 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the association is to promote the welfare of chief petty officers, to promote and protect the rights and benefits of all armed forces personnel and aid in Coast Guard recruiting.

APPENDIX B

Massachusetts Letter Ruling 1985-12
January 31, 1985

You request clarification of Letter Ruling 81-91 regarding the Massachusetts taxation if income received by a Massachusetts resident from a New York State contributory public employee pension. You also ask whether taxable unemployment compensation is considered earned income for purposes of the computation of personal exemptions in item 45 of the 1983 Massachusetts Resident-Individual Income Tax Return Form 1.

I. Massachusetts General Laws Chapter 62, Section 3(B)(a)(4) provides a deduction from Part B adjusted gross income of:

> . . . any income from a contributory annuity, pension, endowment or retirement fund of any state or any political subdivision thereof, provided that *income from any such similar fund established under the laws of the commonwealth is not subject to taxation in such other state* or political subdivision. (Emphasis supplied).

Pursuant to paragraph 3-a of N.Y. Tax Law, Section 612(c) income from a Massachusetts contributory public employee pension received by a New York resident is taxable if the recipient has not attained age 59½, or to the extent the income exceeds $20,000 whatever the age of the recipient. (Letter Ruling (81-91)

Therefore, the deduction set forth in Section 3(B)(a)(4) of the General Laws Chapter 62 will not apply to the income received by a Massachusetts resident from a contributory New York State Teachers Pension. A Massachusetts resident must include all income received from a contributory N.Y. State Teachers Pension in Part B taaxble income regardless of whether the particular pension would be exempt from New York state tax.

II. For Massachusetts income tax purposes in determining the Part B taxable income, the Part B adjusted gross income is reduced by certain personal exemptions. Massachusetts General Laws Chapter 62, Section 3 B(b)(2)(A) provides in pertinent part, that a husband and wife filing a joint return are entitled to ". . . a personal exemption of two thousand two hundred dollars and an amount not exceeding two thousand two hundred dollars, equal to the earned income included in Part B gross income of the spouse having the smaller amount of such income . . .".

"Earned income" for purposes of this exemption is specifically defined to mean ". . . salary, wages, other employee compensation . . .". These terms are not further defined for purposes of the earned income exemption. The Massachusetts definition of "wages" supplied in G.L. c.62B, § 1 is explicitly for ". . . withholding purposes only . . .".

In *Boston Ass'n of School Adm'rs & Supervisors v. Boston Retirement Board*, 383 Mass. 336 (1981) at 341 the Massachusetts Supreme Court indicated that the phrase, "salary, wages or other compensation" refers to remuneration geared to work or services performed.

The concept of "earned income" also arises in the context of federal income taxation. For federal income tax purposes the definition of "earned income" does not generally include unemployment compensation.

A federal "earned income" credit is available for certain low income workers. "The term "earned income" means . . . wages, salaries, tips and other employee compensation . . .". (Internal Revenue Code, Section 43). "Earned income [for purposes of this federal credit] does not include amounts received as . . . unemployment compensation . . .". (U.S. Treas. Reg. 1.43-2c(2)).

"Earned income" for purposes of calculating the federal two earners married couples deduction means ". . .

income which is earned income within the meaning of section 911(d)(2) or 401(c)2(c) . . .". (I.R.C. § 221 (b)(2)). Code Section 911(d)(2) provides that "[t]he term "earned income" means wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered . . .".

For Massachusetts income tax purposes, taxable unemployment compensation is not considered earned income for the purposes of computing the personal exemption available under Chapter 62, Section 3B(b)(2)(A) for a married couple filing a joint return.

Therefore unemployment compensation should not be included in the computation of earned income under item 45 of the Massachusetts Resident Individual Income Tax Return.

APPENDIX C

Massachusetts Technical Information Release 89-10
February 13, 1990

Massachusetts Income Tax Treatment of Contributory Public Employee Retirement Plans of Other States

Introduction

Income from a contributory public employee retirement plan of another state received by a Massachusetts resident may be deducted from Massachusetts adjusted gross income if that State does not tax income received by its residents from a Massachusetts contributory public employee retirement plan. G.L. c. 62, § 3(B)(a)(4). Thus, whether public employee retirement income paid by another state is subject to the Massachusetts income tax depends on the other state's income tax treatment of Massachusetts public employee retirement income. Recently, a number of states changed their income tax treatment of public employee retirement income in response to the United States Supreme Court's decision in *Davis v. Michigan Department of the Treasury*, 109 S. Ct. 1500 (1989). These changes have affected the Massachusetts income tax treatment of public employee retirement income paid by certain states.

Contributory public employee retirement income from thirteen states is deductible from Massachusetts adjusted gross income under Massachusetts General Laws Chapter 62, Section 3(B)(a)(4). The purpose of this Technical Information Release (TIR) is to list those thirteen states.

Application of the Massachusetts Deduction

Massachusetts General Laws Chapter 62, Section 3(B)(a)(4), provides a deduction from Massachusetts adjusted gross income of

any income from a contributory annuity, pension, endowment or retirement fund of any other state or any political subdivision thereof, provided that income from any such similar fund established under the laws of the commonwealth is not subject to taxation in such other state or political subdivision.

Income from contributory public employee pensions of the following states and their political subdivisions is deductible under Massachusetts General Laws Chapter 62, Section 3(B)(a)(4):

Alaska
Connecticut
Florida
Hawaii
Illinois
Nevada
New Hampshire
Pennsylvania
South Dakota
Tennessee
Texas
Washington
Wyoming

This TIR is up to date through the end of each state's 1989 legislative session and may be relied upon for 1989 taxable years. The TIR does not reflect changes in other states' tax laws that may have occurred later. Information concerning any later changes may be available by contacting the taxing authority of the state in question.

APPENDIX D

Massachusetts Letter Ruling 1987-8
December 1, 1987

You have requested a letter ruling on behalf of the * * * (Authority), a political subdivision of the Commonwealth, on the Massachusetts tax consequences to Authority employees of a recent change to the Authority's retirement plan. The facts as you have explained them to us are as follows.

Facts

The Authority retirement plan requires Authority employees to contribute 4% of their salaries annually to the retirement fund. Contributions are deducted from employees' salaries and paid directly into the fund. Generally, the Internal Revenue Code treats such contributions as having been made by the employee, which meant that they were part of each Authority employee's federal gross income for the year.

In February 1988, however, the Authority amended its plan by adopting the "pick-up" provision of Code § 414 (h)(2). In doing so, the Authority stated that the picked-up contributions "shall, as permitted by IRC Section 414(h)(2), be considered employee contributions for all purposes of the Fund and included as employee compensation as defined by the Plan (Pension Agreement, Art. V, § 3(c)). Code § 414(h)(2) provides that

> in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

The effect of Code § 414(h)(2) is to exclude the employee pension contributions that the Authority has "picked up" from the employees' federal gross income and from withholding requirements. *See* Rev. Rul. 77-462. When an employee receives amounts from the fund upon retirement, however, those amounts are taxable for federal income tax purposes. *See id.*

Discussion

The change to the Authority's retirement fund raises two Massachusetts tax questions: (1) how the picked-up contributions will be treated under G. L. c. 62; and (2) how payments to a retiree will be treated under G. L. c. 62. We conclude that: (1) an Authority employee is not required to include the retirement fund contributions picked up by the Authority as part of Massachusetts gross income; and (2) a retired Authority employee may exclude from Massachusetts gross income amounts received from the retirement fund.

A. *Contribution to the Fund*

The Massachusetts personal income tax statute, G. L. c. 62, imposes a tax on a taxpayer's Massachusetts gross income, which, the statute specifies, is the taxpayer's federal gross income, with certain items added thereto and other items excluded therefrom not here relevant. G. L. c. 62, § 2(a). Under Code § 414(h)(2), an Authority employee excludes retirement fund contributions picked up by the Authority from federal gross income. As a result, the employee will also exclude those contributions for Massachusetts tax purposes, unless one of the provisions of G. L. c. 62, § 2(a), requires the employee to add such contributions to federal gross income. There is no such requirement in G. L. c. 62. The picked-up retirement fund contributions are therefore not included in an employee's Massachusetts gross income. (Since the contributions are not included in gross income, employees

may not deduct them from income under G. L. c. 62, § 3(B)(a)(4).)

B. *Benefits Received from the Fund*

On the other hand, amounts received by a retired Authority employee from the retirement fund are included in federal gross income. Code § 61(a)(11). They will therefore also be taxable for Massachusetts purposes unless a specific provision of G. L. c. 62 excludes them. Section 2(a)(2)(E) of G. L. c. 62 provides that a taxpayer may exclude from Massachusetts gross income "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed." See also G. L. c. 62, § 3(B)(a)(4). We conclude that the Authority's retirement fund is one "to which the employee has contributed" and, as a result, that the benefits Authority employees will receive from the fund when they retire are exempt from Massachusetts taxation.

Analyses of both the practical aspects of the plan as amended and the statutory language of the applicable provisions of G. L. c. 62 support this conclusion. First, the change to the Authority's retirement plan alters the substance of the pension arrangement with the Authority's employee in only on way; now, the contribution each employee must make to the fund is not taxable to the employee. The amount of the contribution, representing a percentage of the employee's total salary, remains the same as before the Authority amended its plan. The pension benefits the employee will be entitled to receive, based on the employee's salary history over the course of his or her employment, remain the same. Moreover, the amount an employee must contribute under the Federal Insurance Contributions Act (Code § 3101 *et seq.*), also based on the employee's total salary, remains the same. The retirement fund contributions thus may be said to come from the employees despite the fact that

the contributions are not taxed to the employees as a result of Code § 414(h)(2). Second, there is no requirement in G. L. c. 62 that the exclusion of retirement benefits from taxable income under G. L. c. 62, § 2(a)(2)(E) and § 3(B)(a)(4) apply only to retirement plans that were subject to the $2,000 limit on non-taxable contributions under G. L. c. 62, § 3(B)(a)(4).

APPENDIX E

Massachusetts Technical Information Release 1992-3
April 28, 1992

I. Summary

This Technical Information Release (TIR) explains the Massachusetts income tax treatment of U.S. military retirement benefits in light of the U.S. Supreme Court decision in *Barker v. Kansas*, 60 U.S.L.W. 4322 (April 21, 1992). The TIR concludes that the *Barker* decision does not negate the validity of the distinction between contributory and non-contributory public retirement plans under G.L. c. 62, § 2(a)(2)(E). Therefore, payments from non-contributory public retirement plans, generally including military retirement benefits, remain subject to the Massachusetts personal income tax.

II. Discussion

A. Federal Law

Under the Public Salary Act of 1939, 4 U.S.C. § 111, the United States permits individual states to tax the pay of federal officers and employees, provided that the tax does not discriminate against the officers or employees because of the source of their pay.[1] The Supreme Court has held that preferential tax treatment of retirement income paid to former state and local government employees, based on the source of that income, violates 4 U.S.C. § 111 when it is not extended to federal retirees. *Davis v. Michigan Department of the Treasury*, 489 U.S. 803 (1989).

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[1] 4 U.S.C. § 111 provides as follows: The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

Recently, the U.S. Supreme Court in *Barker v. Kansas*, 60 U.S.L.W. 4322 (April 21, 1992) decided that the state of Kansas discriminated against federal employees in violation of 4 U.S.C. § 111 when it taxed the retirement benefits of military retirees while exempting from tax the retirement benefits of former state employees. Because military "retirees" remain members of the U.S. armed forces and are subject to military justice, to restrictions on civilian employment, and to recall for active service. Kansas had attempted to justify its disparate tax treatment of payments to military retirees and state retirees by describing payments to military retirees as current reduced payments for current services, as opposed to the deferred compensation received by former state employees for past services. The Supreme Court rejected this distinction because payments to a military retiree are based on the retiree's rank and length of service and, in fact, resemble deferred compensation for services previously provided. The Court concluded that Kansas had violated 4 U.S.C. § 111 because its inconsistent tax treatment of state and federal retirees was not "directly related to, and justified by, significant differences between the two classes" of retirees. *Barker*, 60 U.S.L.W. 4322 at ——.

B. Massachusetts Statutes

Massachusetts generally imposes an income tax on the Massachusetts gross income of residents with certain deductions and exclusions, G. L. c. 62. Massachusetts gross income is defined as federal gross income with Massachusetts modifications. G.L. c. 62, § 2. One of these modifications excludes "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed." G.L. c. 62, § 2(a)(2)(E). See also G.L. c. 62, § 3(b)(a)(4). Under the terms of this statute, either state or federal pension payments are exempt from

Massachusetts income tax if the pension funds are contributory. Military retirement benefits generally are subject to Massachusetts income tax because the military retirement system is not a contributory retirement plan. See Technical Information Release 89-6; Letter Ruling 89-1.

C. Barker Decision Does Not Invalidate Massachusetts Law

In *Barker*, the Supreme Court has recognized that state taxing systems do not necessarily violate 4 U.S.C. § 111 merely because they impose tax on the income of federal employees while exempting from tax the income of state employees. Rather, the Court stated that "we evaluate a state tax that is alleged to discriminate against federal employees in favor of state employees by inquiring 'whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes.'" *Barker*, 60 U.S.L.W. 4322, at ——. Thus, significant differences between classes of federal and state employees may justify different tax treatment of the incomes of those classes of employees.

Massachusetts law does not violate 4 U.S.C. § 111 because it does not discriminate against federal retirees on the basis of the source of their pay. See TIR 89-6 (responding to the *Davis* decision). The significant distinctions between the structures of contributory retirement plans and non-contributory plans directly relate to and justify the difference in tax treatment of distributions from these plans. A contributory pension is one in which amounts contributed to the plan are includible in the Massachusetts gross income of the employee (or would be included in the Massachusetts gross income of the employee if the employee were a Massachusetts resident). Under a non-tributory plan, amounts contributed on behalf of an employee are not included in the gross income of the employee and are therefore not subject to tax at the time of contribution. Thus, taxing distributions from

contributory plans can lead to double taxation, while taxing distributions from non-contributory plans will not.

The Supreme Court in *Barker* specifically refrained from invalidating different tax treatment of payments from contributory and non-contributory plans. *Barker*, 60 U.S.L.W. 4322, at —— n. 5. Consequently, the *Barker* decision does not alter the non-discriminatory distinction between payments from these plans currently found in Massachusetts law.

APPENDIX F

EXCERPT FROM 1993 MASSACHUSETTS RESIDENT INCOME TAX FORM 1— ALL SCHEDULES AND INSTRUCTIONS

Item 3

Taxable Pensions and Annuities

Income from most private pensions or annuity plans is taxable in Massachusetts. Certain government pensions, however, are exempt under Massachusetts law. In general, exempt pensions include contributory pensions from the U.S. Government or the Commonwealth of Massachusetts and its political subdivisions. Noncontributory military pensions are taxable in Massachusetts. The following section describes some specific pensions which are exempt. If your pension is exempt, enter "0" in Item 3 and note the source of the pension in the margin. For more information, refer to Technical Information Release (TIR) 89-6 or 92-3.

If your pension is not exempt, you should generally enter in Item 3 the taxable amount reported on your U.S. Form 1040A, line 11b, or U.S. Form 1040, line 17b. In some cases, however, Massachusetts law requires an adjustment to the federal amount. Distributions from annuity, stock bonus, pension, profit-sharing or deferred payment plans or contracts described in Sections 403(b) and 404 of the U.S. IRC must be adjusted to account for your contributions that have been previously taxed. Subtract from such income (as reported on your U.S. Form 1040A, line 11a, or U.S. Form 1040, line 17a) the amount of your contributions which were previously taxed by Massachusetts until the total of your taxed contributions is received. If your pension falls into this category, enter the adjusted amount in Item 3 and explain briefly (in an attached statement) why this amount is different than the amount reported on your U.S. return. If you are receiving distributions from an IRA or Keogh plan, do not report the income here; instead, please refer to the instructions for Item 10.

Supreme Court, U.S.
FILED
FEB 14 1994
OFFICE OF THE CLERK

No. 93-1145

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN E. FILIOS, ET AL., PETITIONERS

v.

MASSACHUSETTS COMMISSIONER OF REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether state taxation of the non-contributory retirement plan benefits paid to federal military retirees violates 4 U.S.C. 111 when contributory and non-contributory retirement plan benefits paid to state and local employees are wholly exempt from state tax.

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INTEREST OF THE UNITED STATES

The Commonwealth of Massachusetts requires members of the United States Armed Forces to pay state income tax on their retirement pay. Pensions and annuities paid to retired state and local government employees, however, are exempt from taxation under the Massachusetts scheme.

The States may not discriminate in taxing the income of federal employees. See 4 U.S.C. 111; *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989); *Barker* v. *Kansas*, 112 S. Ct. 1619 (1992). The United States has a continuing interest in ensuring that its employees are not subjected to discriminatory state tax treatment.

STATEMENT

1. Massachusetts imposes an income tax on retirement benefits, pensions and annuities.[1] The State wholly exempts from this tax, however, any "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed." Mass. Gen. Laws Ann. ch. 62, § 2(a)(2) (E)(Law. Co-op. 1990). Payments received by persons who participated in the pre-1938 noncontributory retirement system for state and local police and firemen are also exempt from the Massachusetts income tax. 1973 Mass. Acts, ch. 876, § 1.

Under the current, contributory retirement system for state and local employees in Massachusetts, 10% of the retirement funds are contributed by the employee and 90% by the governmental units (Pet. App. A48-A49). Beginning in 1987, the employee's share of the plan funding is paid by the state and local government units. Mass. Gen. Laws Ann. ch. 32, § 22(10)(Law. Co-op. 1993). To the extent that the contribution made by the employee—or, after 1987, by the employer on the employee's behalf—exceeds $2000, the employee is subject to the Massachusetts income tax on the excess. See Mass. Gen. Laws Ann.

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[1] Gross income is defined for purposes of the Massachusetts tax as federal gross income subject to state adjustments. Mass. Gen. Laws Ann. ch. 62, § 2 (Law. Co-op. 1990). Pension income is included in federal gross income. 26 U.S.C. 61(a)(9) and (11).

ch. 32, § 22(10)(Law. Co-op. 1993); *id.* ch. 62, § 2(a)(1)(I); *id.* ch. 62, § 3B(a)(4).[2]

The Massachusetts provisions have the following effect: (i) Federal, state and local employees who participate in contributory retirement systems pay state income tax on contributions made by them, or on their behalf, in excess of $2000 per year. Without regard to whether, and to what extent, such personal contributions have in fact been made, participants in "contributory" plans pay no state tax on retirement benefits as received. (ii) Police and fire employees who receive retirement benefits under the pre-1938 Massachusetts noncontributory retirement system also pay no state tax on their retirement benefits. (iii) But federal military retirees, whose pension system is noncontributory, *do* pay state income tax on retirement payments.

2. Petitioners are fourteen retired members of the United States Armed Forces and thirteen spouses who were subject to the Massachusetts income tax on military retirement benefits for years from 1985 through 1988 (Pet. App. A2-A4, A6-A8, A45, A52). Petitioners filed applications for abatement of the state income tax paid on their military retirement benefits, asserting that the more favorable tax treatment afforded to the retirement benefits of state and local government employees violated the nondiscrimination requirement of 4 U.S.C. 111 and the constitutional doctrine of intergovernmental immu-

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[2] The $2000 limit on the tax deduction for the employee share of the annual contribution is reduced by any amount that the employee has paid that year as his personal share of federal employment taxes. Mass. Gen. Laws Ann. ch. 62, § 3B(a)(3) and (4) (Law. Co-op. 1990).

nity (Pet. App. A2-A9). When these applications were denied, petitioners appealed to the Massachusetts Appellate Tax Board.

The Board rejected petitioners' claims (Pet. App. A2-A43, A45). In the Board's view, Massachusetts did not discriminate against federal military retirees by distinguishing between contributory and noncontributory retirement systems (*id.* at A32-A33). The Board recognized that the retirement benefits of retirees from local police and fire departments who remained in the pre-1938 noncontributory retirement system were exempt from Massachusetts income tax. The Board concluded, however, that this facial discrimination in the tax treatment of federal military retirement benefits was not pertinent because petitioners had failed to demonstrate that any person currently received benefits under the pre-1938 Massachusetts noncontributory retirement system (*id.* at A33-A35).[3]

3. The Massachusetts Supreme Judicial Court affirmed (Pet. App. A44-A51). Noting that the retirement systems of the Commonwealth and its local governments were "contributory" and that the retirement system of the federal military was "noncontributory," the court concluded that these "significant differences" justified a different tax treatment of the retirement benefits under the plans (*id.* at A47). The court stated, without elaboration, that the fact that Massachusetts employees contribute only 10% of the funding of the retirement

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[3] The Board also rejected petitioners' argument that the difference in tax treatment of contributory and noncontributory retirement systems violated Article 44 of the Massachusetts constitution (Pet. App. A37-A43).

benefits in their "contributory" plans "is not sufficient to negate the differential tax treatment between the pension systems" (*id.* at A49). The court also concluded that the Massachusetts exemption for retirement benefits received by municipal fire and police personnel under the pre-1938 noncontributory system was irrelevant because petitioners had failed to demonstrate that anyone was collecting a pension under that system (*id.* A49-A50).

DISCUSSION

The decision in this case misinterprets and misapplies this Court's decisions in *Barker* v. *Kansas*, 112 S. Ct. 1619 (1992), and *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989).[4]

1. Congress has consented to state taxation of federal employees only when "the taxation does not discriminate against the * * * employee because of the source of the pay or compensation." 4 U.S.C. 111. This statutory nondiscrimination requirement is coextensive with the prohibition against discriminatory taxes embodied in the constitutional doctrine of intergovernmental tax immunity. *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. at 812-813. As the Court emphasized in *Davis*, the standard for determining whether a state tax abridges the immunities of the federal government is quite different from the standard under which state economic regulations are tested under the Equal Protection Clause. 489 U.S. at 816. Inconsistent state tax treatment of federal and state employees is permitted only when it "is

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[4] *Barker* and *Davis* apply to all open tax years and are therefore applicable to this case. See *Harper* v. *Virginia Department of Taxation*, 113 S. Ct. 2510 (1993).

directly related to, and justified by, 'significant differences between the two classes.'" 489 U.S. at 816, quoting *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 383 (1960). Applying this standard, the Court rejected as insufficient the distinctions asserted to exist between federal and state retirement programs in invalidating state tax provisions that discriminated against federal pension benefits in *Davis* and *Barker*.

In this case, Massachusetts asserts a distinction that was not directly at issue in *Davis* or *Barker*.[5] Massachusetts taxes "noncontributory" federal military retirement benefits while exempting from tax the "contributory" retirement benefits paid to other government employees. The Massachusetts court reasoned that the difference between "contributory" and "noncontributory" systems is significant because the Commonwealth taxes personal contributions to the retirement system as income in the year in which the contribution is made. Under the noncontributory federal military retirement system, by contrast, pension funding is not included in the gross income of the employee and is therefore not subject to tax at the time of funding (Pet. App. A47-A48).

This asserted distinction is unpersuasive. Massachusetts retirement benefits are principally funded —and, since 1987, are exclusively funded—through government contributions. See, *e.g.*, Mass. Gen. Laws

[5] In *Barker* v. *Kansas*, the Kansas Supreme Court had noted that the military retirement system was noncontributory while the State used a contributory system. See 112 S. Ct. at 1626 n.5. The Kansas court, however, "did not rest its decision on this difference" and this Court therefore did not directly address that issue on the merits. *Ibid.*

Ann. ch. 32, §§ 1, 12(2), 22, 22C (Law. Co-op. 1993). Before 1987, the state or local government unit contributed 90% of the funding for retirement benefits (Pet. App. A48-A49); after 1987, the state or local government unit contributed 100% of the funding. See page 2, *supra*. The state and local employees are not subject to state tax on amounts up to $2000 per year funded by them or, on their behalf, by their employers. See Mass. Gen. Laws Ann. ch. 62, §§ 2(a)(1)(I), 3B(a)(4) (Law. Co-op. 1990). See also note 2, *supra*. Thus, Massachusetts seeks to justify taxation of the *full* measure of military retired pay on the ground that some small *part* of the benefits received by state and local employees may have previously been taxed by the State (Pet. App. A48-A49).

The rationale of the court below is further undermined by the fact that the Commonwealth exempts from state tax all retirement benefits paid to municipal police and firemen under the pre-1938 *non*-contributory retirement plan. The fact that the record of this case does not disclose how many persons currently receive such benefits does not alter the fact that the State's "nondiscriminatory" rationale is inconsistent with the State's facially discriminatory legislation.

Moreover, the rationale offered by the Supreme Judicial Court is foreclosed by this Court's decision in *Davis* v. *Michigan Dep't of the Treasury*. In *Davis*, the State sought to justify its tax discrimination against federal retirees by contending that the retirement benefits paid to federal employees were, as a general matter, more generous than those paid to state retirees. 489 U.S. at 816-817. The Court rejected that purported justification because "[a] tax

exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits * * *; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." *Id.* at 817. Under this same reasoning, a tax intended to account for prior taxation of retirement funding would not discriminatorily exempt certain benefits based on their source; instead, it would apply to retirement benefits generally and exempt benefits only to the extent that they reflect previously taxed contributions.

Under the standard applied by this Court in *Davis* and *Barker*, Massachusetts's facially discriminatory taxation of military retirement benefits lacks any coherent or consistent rationale. It is therefore invalid under 4 U.S.C. 111. If the decision in this case were allowed to stand, it would serve as a guidepost for States seeking to circumvent the clear restrictions imposed by 4 U.S.C. 111 and this Court's prior decisions.[6]

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[6] There appears to be a question as to whether the petition in this case is timely. The Massachusetts court issued its decision on the appeal of John E. Filios and his wife, Eleanor G. Filios, on July 13, 1994 (Pet. App. A44 & n.1). The petition for a writ of certiorari was filed more than 90 days later, on November 22, 1994. At the time of the July decision, the court had declined to treat the other named petitioners as appellants in that case. See Pet. App. A45 n.2. A motion for reconsideration of that aspect of the court's order was granted by the Massachusetts court on October 26, 1993 (Pet. App. A52). The petition for a writ of certiorari on behalf of these parties was filed 27 days thereafter.

Rule 13.4 of the Rules of this Court provides that "if a petition for rehearing is timely filed in the lower court by any

CONCLUSION

To the extent that the petition for a writ of certiorari is timely, it should be granted. See note 6, *supra*.

Respectfully submitted.

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Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

DAVID ENGLISH CARMACK
Attorney

FEBRUARY 1994

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party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment."

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Supreme Court, U.S.
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No. 93 - 1145

In The
Supreme Court of the United States
October Term, 1993

JOHN E. FILIOS, ET AL.
PETITIONERS

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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JOHN E. FILIOS, ET AL.
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V.

COMMISSIONER OF REVENUE OF MASSACHUSETTS
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

Pursuant to Rule 15.6 of the Rules of this Court, petitioners John A. Filios et al. submit this Reply to the Brief in Opposition to the Petition filed in this case.

I. THIS CASE RAISES QUESTIONS OF NATIONAL IMPORTANCE.

The Respondent Commissioner of Revenue of Massachusetts asks this Court to deny the petition for a writ of certiorari on the grounds, among others, that petitioners' claims do not raise "issues of national importance warranting review by this Court." Respondents' Brief in Opposition at 13. The record now before the Court convincingly demonstrates the contrary.

Petitioners respectfully call to the Court's attention the brief amicus curiae filed in support of the petition by The Military Coalition, an organization representing over 1,900,000 men and women, living in all 50 states, who are retired, reserve or active members of the uniformed services. As the Coalition's brief points out, Massachusetts' policy of taxing federal military retirees' benefits while completely exempting benefits received by state and local retirees presents a threat to the ability of Congress to choose how to compensate the men and women responsible for our national defense, a consideration of obvious national importance. See U.S. Const., art. I, § 8, cl. 12, 13 and 14.

Further evidence that the decision of the Massachusetts Supreme Judicial Court does implicate matters of national significance is the fact that the Solicitor General has filed a brief amicus curiae supporting the petition on behalf of the United States. As the Solicitor General notes, "[t]he United States has a continuing interest in ensuring that its employees are not subjected to discriminatory tax treatment." Brief for the United States at 1.

The implications of the decision below go far beyond the 24,000 retirees living in Massachusetts whose tax bills are directly affected by Filios v. Commissioner of Revenue, 415 Mass. 806 (1993). The Solicitor General points out, "[i]f the decision in this case were allowed to stand, it would serve as a guidepost for States seeking to circumvent the clear restrictions imposed by 4 U.S.C. 111 and this court's prior decisions." Id. at 8.

As this Court recently noted, in a case involving application of 4 U.S.C. 111, the same statute at issue here, state courts have shown difficulty in accepting this Court's decisions in this area "as a controlling statement of federal law." Harper v. Virginia Department of Taxation, __ U.S. __, 125 L. Ed. 2d 74, 83-84 (1993). That strongly suggests that if the decision below is not corrected, other states will be prompt in following Massachusetts' "guidepost" on how states can circumvent section 111 and continue to tax federal workers while protecting their own employees from tax. See Brief for the United States at 8.

II. THE PETITION IS TIMELY AS TO ALL PETITIONERS.

The Respondent Commissioner of Revenue appears to concede that the Petition in this case, which was filed on November 22, 1993, was timely as to all petitioners other than John A. and Eleanor G. Filios, the named appellants before the Massachusetts Supreme Judicial Court. Brief in Opposition at 13-14 (state court order "arguably gave other parties 90 days to file a petition [after October 26, 1993]"). This concession would seem to make the Commissioner's argument that the Petition was untimely as to John and Eleanor Filios almost entirely irrelevant.[1]

In any event, the Commissioner is clearly wrong. He correctly cites Rule 13 of the Rules of this Court as controlling on the timeliness of petitions for a writ of certiorari. Brief in Opposition at 13. However, he fails to note Rule 13.4 which specifically deals with the exact situation here. As the United

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1. From the outset this has been a test case pursued by the named parties on behalf of all military retirees living in the Commonwealth. Pet. A-4. Colonel and Mrs. Filios did not invest years of effort before state agencies and courts in order to obtain the refund of a few dollars for themselves. They sought, and continue to seek, to correct a wrong inflicted on all Massachusetts veterans.

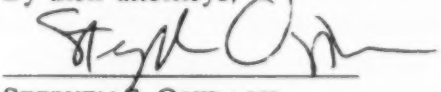
States notes (at 8, n. 6), that Rule provides that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." (Emphasis supplied). Thus, contrary to the Commissioner's belief, Brief in Opposition at 14, the October 26, 1993, Order of the Massachusetts court did extend the time for Colonel and Mrs. Filios to file.

In light of Rule 13.4, the last date for filing a petition for all petitioners, including Colonel and Mrs. Filios, was 90 days from the date of the Supreme Judicial Court Order of October 26, 1993. Pet. A. 52. Since the petition here was filed on November 22, 1993, it was timely.

CONCLUSION

For the foregoing reasons and those stated in the Petition, petitioners request that their application for a writ of certiorari be granted.

Respectfully submitted,
John E. Filios et al.
By their attorneys,



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No. 93-1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993.

JOHN E. FILIOS, ET AL.,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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Question Presented

Pursuant to the Court's order of March 4, 1994, the respondents address the following supplemental issue:

Was the petition for certiorari timely filed under 28 U.S.C. § 2101(c)(1988)?

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NO. 93-1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993.

JOHN E. FILIOS, ET AL.,
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v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Pursuant to the Court's order dated March 4, 1994, the respondent, Commissioner of Revenue of Massachusetts ("Commissioner"), submits this supplemental brief in opposition to the petition filed by petitioners.

Statement

1. The final judgment of the Massachusetts Supreme Judicial Court is dated July 13, 1993. The application of petitioner John A. Filios to extend time for filing a petition for a writ of certiorari was denied by Justice Souter on October 15, 1993. On October 26, 1993, the Supreme Judicial Court granted the petitioners' motion to amend their notice of appeal

in that court to name separately appellants in addition to John A. Filios. The petition for a writ of certiorari was served on behalf of 27 individual taxpayers on or about November 17, 1993, more than 90 days after the Supreme Judicial Court's original judgment, but within 90 days of the Supreme Judicial Court's October 26 Order allowing amendment of the notice of appeal. On January 18, 1994, the Clerk sent notice that this case was docketed on November 22, 1993. The timeliness of this petition turns upon the procedural history leading up to the Supreme Judicial Court's judgment of July 13, 1993 and its subsequent October 26, 1993 Order.

2. At various times in late 1989 and 1990, the Commissioner denied each of the applications for abatement filed by the 27 taxpayers named in the petition for certiorari. Pet. App. A-7. The taxpayers appealed to the Massachusetts Appellate Tax Board ("Board"), which upheld the Commissioner's decision. Pet. App. A-2. See Mass. Gen. Laws c. 62C, § 39; c. 58A, § 7.

Two of the petitioners, John and Eleanor Filios ("the Filios petitioners"), filed a notice of appeal from the Board's decision, but failed to name the other 25 petitioning taxpayers ("non-Filios parties") in the notice of appeal. Responding to an argument in the Commissioner's brief in the Supreme Judicial Court, the taxpayers filed a motion to amend their notice of appeal on March 26, 1993, to which the Commissioner assented. See appendix to this supplemental brief ("SA") at page SA-8. On July 13, 1993, the Supreme Judicial Court of Massachusetts affirmed the Board. *Filios* v. *Commissioner of Revenue*, 415 Mass. 806, 615 N.E.2d 933 (1993), Pet. App. A-44 to 51. In the same opinion, the Court ruled that, due to the failure to name all 27 taxpayers in the

notice of appeal, "[t]he only appeal before us is that of John E. and Eleanor G. Filios." *Id.*, A-45, n.2.

On July 22, 1993, the petitioners sent a letter to the Clerk of the Supreme Judicial Court, which is reprinted at SA-3 to 4. The letter informed the clerk of the petitioners' intention to file a petition for a writ of certiorari. It also stated:

> In order to clarify an issue that may arise in connection with that petition, I would also like to request information on the status of the Appellants' Motion for Leave to File Amended Notice of Appeal and the Amended Notice of Appeal filed on March 26, 1993, together with Appellants' Reply Brief.

Id. A substantially similar letter was sent to the clerk of the Supreme Judicial Court on October 1, 1993. SA-2.

On October 12, 1993, petitioner John E. Filios (but not Eleanor G. Filios) filed in this Court an application to extend the time to file a petition for a writ of certiorari. The application was denied by Justice Souter on October 15, 1993.

On October 26, 1993, the Supreme Judicial Court of Massachusetts granted the petitioners' "request to reconsider [their] motion to amend the notice of appeal to separately name the 27 [sic] individuals not named in the notice of appeal" (i.e. all parties other than John Filios). Pet. App. A-52. It stated that the allowance was "for purposes of seeking review in the Supreme Court of the United States." *Id.* The Supreme Judicial Court directed that allowance of the motion be reflected in the docket, but that its published opinion "will remain unchanged." *Id.*

The petitioners served their petition for a writ of certiorari on or about November 17, 1993, which was docketed as filed on November 22, 1993.

Argument

I. THE PETITION IS UNTIMELY AS TO JOHN AND ELEANOR FILIOS.

John E. and Eleanor G. Filios were parties to the Supreme Judicial Court's decision, issued on July 13, 1993. *Filios*, 415 Mass. at 807 n.2, 615 N.E.2d at 933 n.2, A-45 n.2. They had a right to apply for certiorari for 90 days thereafter, until October 9, 1993, pursuant to Supreme Court Rule 13. John, but not Eleanor, Filios applied for an extension of time to file the petition, which was denied by Justice Souter on October 15, 1993. Their petition, filed on November 22, was untimely.

In their reply brief, the petitioners argue for the first time that their petition was timely under the second sentence of Supreme Court Rule 13.4, which reads, in relevant part:

> [I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

See also Brief for the United States as Amicus Curiae Supporting Petitioners, p. 8 n.6 (quoting rule, but taking no position on the timeliness issue).

Under Massachusetts law, a petition for rehearing is timely if "filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order." Mass. R. App. P. 27(a), reproduced below at SA-1 to 2. The petition must "be in the form of a letter to the senior justice of the quorum or panel which decided the appeal with seven clear and legible copies . . ." Mass. R. App. P. 27(b).

While the petitioners do not specify the alleged petition for rehearing upon which they rely, the only document filed within the time for rehearing was the petitioners' July 22 letter to the Clerk of the Supreme Judicial Court. SA-9. That document does not constitute a "petition for rehearing" within Supreme Court Rule 13.4 (second sentence). By its terms, it was only a request for "information" from the clerk on the status of a pending motion, rather than a petition for the Supreme Judicial Court to take some action to alter its decision. As a letter to the clerk (not "the senior justice of the quorum."), it not only departed from the formal requirements of Mass. R. App. 27(b), but also failed to alert the court and counsel to any request for judicial action, as opposed to a simple clerical response. The clerk, in fact, docketed the letter as "Notice of intent to file petition for certiorari . . .." SA-9.

Nor did the petitioners' actions reflect any understanding that the letter was a request for rehearing. They filed a motion in this Court requesting the Circuit Justice to extend time for filing a petition for certiorari, which would have been superfluous under Rule 13.4 if a timely petition for rehearing had been filed.

This court has held that a document is not a petition for rehearing if it does "not seek to have the [State's highest court]

reconsider any question decided in the case." *Department of Banking of Nebraska v. Pink*, 317 U.S. 264, 266 (1942). The Court noted that in that case the "final judgment already rendered was not challenged . . ." and held that the document in question was not a petition for rehearing. *Id.* A memorandum does not qualify as a petition for rehearing if it "was labeled neither as a petition for a rehearing nor as a motion to amend the previous judgment, and in no manner did it purport to seek such relief". *FTC v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 210 (1952). Under these authorities, petitioners' letter of intent, which also sought information from the clerk, does not constitute a petition for rehearing, because it does not challenge the judgment.

The distinction between petitions for rehearing and other post-judgment documents is also reflected in the federal rules' distinction between Petitions for Rehearing and Suggestions for Rehearing In Banc. See Fed. R. App. P. 35(a)(rehearing in banc), 40(a)(petitions for rehearing). The essence of the former avenue is that the "panel is required to consider the contentions in the petition for rehearing, if only to reject them. Rehearing in banc is a discretionary procedure . . . . 'A suggestion is neither a petition nor a motion; consequently, it requires no disposition by the court'". *Missouri v. Jenkins*, 495 U.S. 33, 46, n.14 (1990), quoting Ward, The Federal Rules of Appellate Procedure, 28 Federal B.J. 100, 110-111 (1968).

Petitioners' letter to the clerk informing the Supreme Judicial Court of an intention to apply for certiorari and seeking information does not amount to a petition for rehearing, because it does not require judicial action within the

meaning of *Jenkins*. It follows that the time for filing a petition for certiorari in this case expired on October 9, 1993. The filing on November 22 was therefore untimely.

II. THE PETITION IS UNTIMELY AS TO THE NON-FILIOS PETITIONERS.

In the absence of a timely petition for rehearing, there is also a jurisdictional issue with respect to the non-Filios petitioners.[1] For this group of petitioners, the question is whether, after the time for certiorari had already run, the Court's Order of October 26, 1993 could effectively revive the right to petition for certiorari by adding parties to the July 13 judgment.

The case presents this issue upon particularly stark facts. The two sets of petitioners here have always been part of one group, represented by the same counsel, making the same arguments on virtually identical facts. Pet. at A-44 to 51. The Supreme Judicial Court of Massachusetts allowed their motion to amend the notice of appeal expressly "for purposes of seeking review in the Supreme Court of the United States." (Pet. at A-52). It underscored that purpose by specifying that the Court's published opinion "will remain unchanged". *Id.*

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[1] The petitioners' reply brief (p. 3) refers to an alleged "concession" that the petition for a writ of certiorari is timely as to the non-Filios petitioners. While the respondents argued that the petition was "untimely, at least as to John and Eleanor Filios" (Opposition at p. 13), they made no such concession. In any event, the matter is jurisdictional and cannot be conceded by counsel. See *Jenkins*, 495 U.S. at 45.

In such a case, "[t]he time for applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending that time." *Missouri v. Jenkins*, 495 U.S. at 49,[2] citing *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 137 (1937); *Conboy v. First National Bank of Jersey City*, 203 U.S. 141, 145 (1906); *Credit Company, Limited v. Arkansas Central Railway Company*, 128 U.S. 258, 261 (1888). Indeed, if a judgment may be revived in the fashion attempted here, then there is no such thing as "the final word of a final court." See *Market Street Railway Co. v. Railroad Commission of California*, 324 U.S. 548, 551 (1945). Intervention by a new party or the amendment of a state court notice of appeal more than 90 days after a State Supreme Court's final judgment "for purposes of seeking review in the Supreme Court of the United States" would create an easy route for avoiding the time limits of 28 U.S.C. § 1201(c) and Supreme Court Rule 13. In order to prevent such circumvention of the rules, the Court has held:

> When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which

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[2] Unlike *Jenkins*, 495 U.S. at 49-50, this case does not involve a lower court's determination that the document before it was in fact a petition for rehearing. This Court's analysis of the facts in *Jenkins* demonstrates that a *nunc pro tunc* amendment of a judgment for the purpose of extending the time to petition for certiorari would not confer jurisdiction upon the United States Supreme Court.

> limits the time within which an appeal can be taken would be a dead letter.

Credit Co., 128 U.S. at 261. See also *Minneapolis-Honeywell Co.*, 344 U.S. at 211 ("the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged.").

Even if there were justification for entering a new order for the purposes of extending the time to petition for certiorari, the non-Filios parties' petition falls within the rule that "the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *Minneapolis-Honeywell Co.*, 344 U.S. at 211 (footnote omitted). *FCC v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984). See generally Stern and Gressman, *Supreme Court Practice*, pp. 287-89 (7th ed. 1993). Nothing in the October 26, 1993 Order of the Supreme Judicial Court alters any issue upon which certiorari is sought. The state court's October 26 Order expressly did not change the published opinion, and addressed only the status of the non-Filios parties, given the failure to name them in the original notice of appeal. The question whether a *state* court notice of appeal includes parties not specifically named in the notice is not and could not be the subject of the present petition. All issues included in the petition were finally resolved by the Supreme Judicial Court's July 13, 1993 judgment, so that, in the absence of a timely petition for rehearing, the petition filed on November 22 was jurisdictionally out of time.

Conclusion

For the foregoing reasons, as well as those stated in the Respondent's Brief in Opposition[3], the petition for a writ of certiorari should be denied.

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General
of Massachusetts

DOUGLAS H. WILKINS*
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(617) 727-2200
**Counsel of Record*

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[3] The respondent also notes the pendency of a state legislative proposal, filed by the Governor with his annual budget bill in the Massachusetts House of Representatives, which would exempt from state income taxation "any income received from the United States government as military retirement compensation, to the extent included in federal gross income, regardless of whether the recipient contributed to the military retirement system." 1994 Mass. House Doc. 1, § 53 (Jan. 1, 1994).

Statutory Provisions Involved

28 United States Code § 2101(c).

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Massachusetts Rules of Appellate Procedure

Rule 27. Petition For Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing should be filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted, except by order of the quorum or panel which decided the appeal. No answer to a petition for rehearing will be received unless requested by the quorum or panel, but a petition for rehearing will ordinarily not be granted in the absence of such a request. A petition for rehearing shall be decided by the quorum or panel which decided the appeal. If a petition for rehearing is granted, the quorum or panel may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed

appropriate under the circumstances of the particular case. Action upon a petition is in the discretion of such quorum or panel, which may award costs, including a reasonable attorney's fee, to the prevailing party.

(b) Form of Petition; Length. The petition shall be in a form of a letter to the senior justice of the quorum or panel which decided the appeal with seven clear and legible copies, and additional copies shall be mailed by first class mail or delivered to all other counsel. Except by permission of the quorum or panel, a petition for rehearing shall not exceed ten pages of standard typewritten material.

NEW ENGLAND LEGAL FOUNDATION

July 22, 1993

Jean M. Kennett, Clerk
Supreme Judicial Court
for the Commonwealth
1412 Suffolk County Court House
Boston, MA 02108

RE: *Filios* v. *Commissioner of Revenue*, C.A. No. 6066, 415 Mass. 806 (1993)

Dear Ms. Kennett:

I am counsel for the Appellants in the above-captioned case. My clients have instructed me to inform the Court and counsel for the Commissioner that it is their present intent to seek further review of this matter by filing a petition for a writ of certiorari with the U.S. Supreme Court.

In order to clarify an issue that may arise in connection with that petition, I would also like to request information on the status of the Appellants' Motion for Leave to File Amended Notice of Appeal and the Amended Notice of Appeal filed on March 26, 1993, together with Appellants' Reply Brief. That motion was filed in order to clarify that the appeal in this matter was filed on behalf of all 14 parties in the consolidated Appellate Tax Board proceeding.

As I informed the Court at oral argument, that Motion was not opposed by counsel for the Appellee Commissioner of Revenue. However, the court's decision in this case does not refer to or specifically address what, if any, action has been taken on that motion. *See* 415 Mass. at 807, n. 2.

Although of course my clients and I were disappointed in the decision in this matter, I wish to thank you and counsel for the Commissioner for the courtesy and professionalism your office and the Department of the Attorney General have repeatedly demonstrated in this matter.

Sincerely,

S/
Stephen Ostrach

cc: Douglas H. Wilkins, AAG

150 LINCOLN STREET * BOSTON, MA 02111
*(617) 695-3660 * FAX (617)695-3656

NEW ENGLAND LEGAL FOUNDATION

October 1, 1993

Jean M. Kennett, Clerk
Supreme Judicial Court
for the Commonwealth
1412 Suffolk County Court House
Boston, MA 02108

RE: *Filios* v. *Commissioner of Revenue*, C.A. No. 6066, 415 Mass. 806 (1993)

Dear Ms. Kennett:

I am counsel for the Appellants in the above-captioned case. My clients have instructed me to inform the Court and counsel for the Commissioner that it is their present intent to seek further review of this matter by filing a petition for a writ of certiorari with the U.S. Supreme Court.

In order to clarify an issue that may arise in connection with that petition, I would also like to request information on the status of the Appellants' Motion for Leave to File Amended Notice of Appeal and the Amended Notice of Appeal filed on March 26, 1993, together with Appellants' Reply Brief. That motion was filed in order to clarify that the appeal in this matter was filed on behalf of all 14 parties in the consolidated Appellate Tax Board proceeding. A copy of that motion is attached.

As I informed the Court at oral argument, that Motion was not opposed by counsel for the Appellee Commissioner of Revenue. However, the court's decision in this case does not refer to or specifically address what, if any, action has been taken on that motion. *See* 415 Mass. at 807, n. 2.

In view of the approaching deadline for seeking certiorari I would appreciate being informed of the Court's action on our motion as soon as possible.

As always, I appreciate your assistance.

Sincerely,

S/
Stephen Ostrach

cc: Douglas H. Wilkins, AAG

150 LINCOLN STREET * BOSTON, MA 02111
*(617) 695-3660 * FAX (617)695-3656

[Docket Sheet]

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SJC-06066

John E. Filios & others vs. Commissioner of Revenue
[identifying information and appearances omitted]

PAPER	DATE	ENTRY
1.0	10/13/92	Entered.
2.0	11/05/92	MOTION to extend to 11/19/92 filing of brief of Plaintiffs/Appellants by Stephen Ostrach, Esquire. ALLOWED. Notice to Counsel.
3.0	11/06/92	Appearance of Stephen Ostrach as co-counsel for plaintiffs/appellants.
4.0	11/30/92	MOTION to extend to 12/11/92 filing of brief of Plaintiffs/Appellants and for filing of brief for Defendant/Appellee to 1/15/93. Assented and ALLOWED. Notice to counsel.

5.0	12/21/92	SERVICE of brief & appendix for Plaintiff/Appellant John E. Filios by Stephen S. Ostrach, Esquire
6.0	01/13/93	MOTION to extend to 02/19/93 filing of brief of Defendant/Appellee Commissioner of Revenue by Thomas A. Barnico, A.A.G. Assented and ALLOWED. Notice to counsel.
7.0	02/17/93	MOTION to extend to 03/05/93 filing of brief of Defendant/Appellee Commissioner of Revenue by Douglas H. Wilkins, A.A.G.: Assented and ALLOWED. Notice to counsel.
8.0	03/05/93	SERVICE of brief for Defendant/Appellee Commissioner of Revenue by Douglas H. Wilkins, A.A.G., Thomas A. Barnico, A.A.G..
8.5	03/26/93	MOTION to file amended notice of appeal (to separately name 27 individuals, consolidated in court below) filed by Stephen Ostrach, Esquire (assented for defendant by Douglas H. Wilkins, A.A.G.). REFER TO QUORUM.

8.6	03/29/93	SERVICE of reply brief for plaintiffs/appellants by Stephen S. Ostrach, Esquire.
	05/03/93	Oral argument held. (CJL A N LY).
9.0	07/13/93	RESCRIPT JULY 13, 1993. The decision of the Appellate Tax Board is affirmed. Reasons as on file. Notice to counsel.
10.0	07/23/93	Notice of intent to file petition for certiorari, filed by Atty. Stephen Ostrach.
11.0	10/04/93	Request for action on the Appellants' Motion for Leave to File Amended Notice of Appeal (with the Amended Notice of Appeal) filed by Stephen Ostrach, Esquire. (See Paper #8.5).
12.0	10/25/93	ORDER: The request to reconsider the plaintiffs' motion to amend the notice of appeal to separately name the 27 individuals consolidated in the trial court is hereby allowed for purposes of seeking review in the Supreme Court of the United States. The docket shall reflect the allowance of the motions. The published opinion of this court will

		remain unchanged. (By the Court (Abrams, J.))
13.0	01/24/94	Notice received from U.S. Supreme Court of filing of petition for certiorari. Forwarded to author.

Supreme Court, U.S.
FILED
MAR 16 1994
OFFICE OF THE CLERK

No. 93 - 1145

In The
Supreme Court of the United States
October Term, 1993

JOHN E. FILIOS, ET AL.,
PETITIONERS

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITIONERS' SUPPLEMENTAL MEMORANDUM ON TIMELINESS

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No. 93 - 1145

In The
Supreme Court of the United States
October Term, 1993

JOHN E. FILIOS, ET AL.,

PETITIONERS

V.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITIONERS' SUPPLEMENTAL MEMORANDUM ON TIMELINESS

Pursuant to an Order entered by the Court on March 4, 1994, petitioners John A. Filios et al. submit this Supplemental Memorandum on the timeliness of the Petition filed in this case.

I. CHRONOLOGY OF THIS ACTION

For more than seven years, military retirees living in Massachusetts have sought a determination as to whether that state's policy of levying state income tax on military retirement benefits while totally exempting from that tax retirement benefits received by all state and municipal retirees discriminates against federal employees in violation of 4 U.S.C. §111. Pet. A. 7-8.

From the outset this matter has been pursued on behalf of all veterans living in Massachusetts; the 27 individuals ("veterans") who have invested their time and energy in pursuing this matter have done so only as representatives of the state's 24,000 military retirees. Pet. A. 4. At no stage has this matter turned on the individual circumstances of any of the named parties, as shown by the Stipulation entered into below and recognized by the Appellate Tax Board's decision. Pet. A. 4, 6.

Four years after the veterans first appeal was filed, the Appellate Tax Board ruled against them on October 8, 1991. Pet. A. 1. The veterans asked the Board for a report pursuant to Mass. G.L. c. 58A, §13 and later sought reconsideration in light of this Court's intervening decision in Barker v. Kansas, __ U.S. __, 118 L. Ed. 2d 243 (1992). Pet. A. 2, 25. On July 1, 1992, the Board denied reconsideration and issued a report. Pet. A. 2-43. The decision ran against the fourteen veterans (and thirteen spouses) whose appeals had been consolidated by the Board. Pet. A. 7-8. The caption of the Board's decision listed appellants as "John E. and Eleanor G. Filios et al." The individual taxpayers' names were given only in a table in the body of the Report. Pet. A. 2, 7-8.

One notice of appeal was filed on behalf of all 27 taxpayers. The notice used the precise wording the Board used to enter judgment against them, "John E. and Eleanor G. Filios et al." Filios et al. v. Commissioner of Revenue, 415 Mass. 806, 807 n.2 (1993), Pet. A. 45. In his brief to the Supreme Judicial Court, the Commissioner challenged the adequacy of the notice as to veterans

other than John and Eleanor Filios. Id." In order to correct any formal deficiency in the notice, appellants filed a motion to amend the notice to separately name all 27 taxpayers, a remedial procedure approved by Cummings v. City Council of Gloucester, 28 Mass. App. 345, 349 (1990), the same case relied upon by the Commissioner. That motion was not opposed.

On July 13, 1993, the Massachusetts Supreme Judicial Court affirmed the Board's decision. Pet. A. 44-51. Unfortunately the decision did not reflect appellants' unopposed motion to amend the notice of appeal and so it held that "[t]he only appeal before us is that of John E. and Eleanor G. Filios." Pet. A. 45, n.2. Accordingly that court did not, on July 13 1993, decide the merits of the appeal filed on behalf of the other 25 veterans and spouses.

The veterans then instructed their counsel to prepare an application to this Court for a writ of certiorari to review the Supreme Judicial Court's decision. In order that that application reflect the representative nature of this litigation, counsel promptly requested the Supreme Judicial Court to reconsider its decision at least insofar as it did not grant the motion for leave to amend the notice of appeal. Pet. A. 52. That court did not act upon that request for several months. In the interim, petitioners' counsel requested this Court to extend the time for applying for a writ of certiorari, a request denied by Justice Souter on October 15, 1993.

On October 26, 1993, the Supreme Judicial Court did allow the request to reconsider its earlier decision. Pet. A. 52.[1] While

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1. The lower court's action thus eliminates any argument the Respondent might belatedly seek to raise challenging the process which Petitioners followed below. "Even without a timely petition for rehearing, the court below may change its judgment and thus affect the commencement of the time for petitioning for certiorari. A court may make such a change . . . in response to a motion for clarification . . . ". R. Stern, E. Gressman, S. Shapiro and K. Geller, Supreme Court Practice, §6.4 at 287 (7th ed. 1993).

the court's order did not change its prior legal analysis of the merits of the veterans' claims, it did modify its judgment to provide that all 27 taxpayers' appeals were properly before it. Id. It was only after the October 26 Order that the 25 taxpayers other than John and Eleanor Filios had a final judgment on the merits from the highest court of the state, a jurisdictional prerequisite for review by this Court. 28 U.S.C. §1257; R. Stern, E. Gressman, S. Shapiro and K. Geller, Supreme Court Practice, §3.14 (7th ed. 1993)("Stern and Gressman").

Before that date the only substantive decision affecting those 25 taxpayers was the 1991 decision by the Appellate Tax Board, a decision by an administrative body which clearly cannot be reviewed by this Court. See Stern and Gressman, §3.18. The only judicial decision affecting the 25 taxpayers was the July 13, 1993, opinion by the Supreme Judicial Court which had concluded, entirely as a matter of state procedure, that their appeals were not properly before it. As a decision resting upon a state law ground, this Court would have had no jurisdiction to grant review to those 25 taxpayers even though the lower court's decision on the substantive issue before it did involve a reviewable federal question. See R. Stern, E. Gressman, S. Shapiro and K. Geller, Supreme Court Practice §3.25 (7th ed. 1993).

The October 25, 1993, Order of the Supreme Judicial Court granting petitioners' request for reconsideration changed the situation entirely. By adding the 25 taxpayers as parties to its judgment, the Supreme Judicial Court finally, and for the first time, put them in position to ask this Court to hear their case. The Petition here was filed on November 22, 1993, well within 90 days after the October 26 Order. Cf. 28 U.S.C. §2101(c).

II. THE PETITION IS TIMELY AS TO ALL PETITIONERS.

By Order of March 4, 1994, this Court ordered supplemental memoranda on the timeliness of the petition filed on November 22, 1993 in this case in light of 28 U.S.C. §2101(c).

For the following reasons, Petitioners believe their petition was timely.

Rule 13.4 of the Rules of this Court provides that:

> if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment."

Since the Supreme Judicial Court expressly "allowed" the request for reconsideration, Pet. A. 52, the clear language of Rule 13.4 provides that the time for seeking certiorari began on October 26, not July 13, 1993. Indeed in his Opposition to the Petition the Respondent appears to have conceded that the Petition in this case, which was filed on November 22, 1993, was timely as to all petitioners other than John A. and Eleanor G. Filios. See Brief in Opposition at 13-14 (state court order "arguably gave other parties 90 days to file a petition [after October 26, 1993]"). Given that this case has never been about the particular individual situation of any of the veterans, that concession would seem to make the Commissioner's argument that the Petition was untimely as to John and Eleanor Filios almost entirely irrelevant.

In any event, the Commissioner's argument that the petition was untimely as to John and Eleanor Filios is clearly wrong. He correctly cites Rule 13 as controlling on the timeliness of petitions. Brief in Opposition at 13. However, he fails to note that Rule 13.4, as quoted above, specifically deals with the exact situation here. As the United States noted (at 8, n. 6), in its Brief as Amicus Curiae Supporting Petitioners, the Rule provides that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the . . . entry of a subsequent

judgment." (Emphasis supplied). Thus, contrary to the Commissioner's belief, Brief in Opposition at 14, the October 26, 1993 Order did extend the time for John and Eleanor Filios to file. See Stern and Gressman, §6.3 at 286 (Rule 13.4 removes any doubt whether filing of a petition for rehearing by one party tolls the time for all other parties to seek certiorari.)

The leading commentary on this Court's practice notes that "[t]he consistent practice of the Court has been to treat petitions for rehearing . . . as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." Stern and Gressman, §6.23 at 284; see also United States v. Ibarra, 502 U.S. __, 116 L. Ed. 2nd 1, 7 (1991)(petition for rehearing renders original judgment nonfinal for purposes of appeal so long as petition is pending). Thus not only was the November 22, 1993 petition timely in light of Rule 13.4, if Petitioners had filed an application for a writ of certiorari prior to the October 26, 1993 Order, it might have been argued that such an application would have been premature.

Petitioners are not aware of any other argument that has been raised against the timeliness of their Petition by the Respondent. However, in light of this Court's March 4, 1994 Order, counsel will address an additional argument, even though it is one which Respondent has not, to date, chosen to raise.

That argument would be that the lower court's Order of October 26, 1993, allowing Petitioners' request for reconsideration, did not trigger the running of a new 90 period for seeking review because it dealt only with matters of form, not substance. Cf. Department of Banking v. Pink, 317 U.S. 264, 266 (1942). This Court has noted that the "mere fact that a judgment previously entered is reentered or revised in an immaterial way does not toll the time in which review must be sought." FCC v. League of Women Voters, 468 U.S. 364, 373 n. 10(1984)(emphasis supplied). Similarly if a judgment is revised only to correct a "formal defect" the time for seeking certiorari runs from entry of the original judgment. See Stern and Gressman, §6.4 at 289, n. 26 citing

Missouri v. Jenkins, 495 U.S. 33, 45 n. 13 (1990).

That proposition has no application here. While the Supreme Judicial Court's October 26 Order did not change that court's legal analysis, it did substantially change the legal rights of 25 of the 27 taxpayers who had appeared before it. Before entry of the Order allowing reconsideration, those 25 veterans and spouses did not have a right to seek review by this Court of their federal claim that 4 U.S.C. §111 barred state taxation of their veterans benefits. After entry of that Order, as the lower court specifically intended would happen, see A. 52, those 25 taxpayers did have a final reviewable decision. This Court has noted that:

> [t]he test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206, 212 (1952).

The Supreme Judicial Court's October 26 Order reversed its earlier holding that state procedural law barred the 25 taxpayers from raising their federal claim. That was a substantive judicial action which, by removing the independent state law ground that would otherwise have been an insuperable barrier to review by this Court, clearly changed the taxpayers' "legal rights." The petition thus meets the "practical test" and the case does not fall within the "mere form" exception to the Court's "consistent practice" of treating petitions for rehearing as tolling the certiorari period.

Even if the law on this point were not clear, Petitioners believe it would be particularly unfortunate to belatedly allow the timeliness issue to prevent this Court from considering the significant federal issue they have worked for more than seven years to have resolved. As noted above, the issue raised here directly and currently affects all 24,000 military retirees living in

the Commonwealth and, as the amicus brief filed by the United States demonstrates, it may come to affect state tax treatment of retirement benefits received by millions of veterans nationally. Postponing[2] review of the legal analysis employed below, particularly on the basis of a timeliness argument which Respondents' own counsel did not raise, would not inform this Court's ultimate decision or advance any other interest.

The underlying issue here is whether states can avoid the clear command of 4 U.S.C. §111 and this Court's decisions in Davis v. Michigan Department of the Treasury, 489 U.S. 803 (1989) and Barker v. Kansas, 503 U.S. __, 118 L. Ed. 2nd 243 (1992) and continue to use their tax laws to discriminate against federal employees. As the Solicitor General warned in his amicus brief "[i]f the decision in this case were allowed to stand, it would serve as a guidepost for States seeking to circumvent the clear restrictions imposed by 4 U.S.C. 111 and this Court's prior decisions." Brief for the United States at 8. So long as Massachusetts' decision stands as good law, that "guidepost" will be a road map for any state that wishes to distort its tax laws "to benefit itself and those in privity with it . . . ," the precise type of discrimination that section 111 was intended to bar. Davis, 489 U.S. supra at 815, n.4.

The Petition here raises an important issue of national significance and it was timely filed. Petitioners believe that this court should grant the petition for a writ of certiorari or, in light of the strong support given Petitioners' position by the United State's amicus brief, summarily reverse the decision below.

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2. Review would only be postponed, not barred, because Massachusetts continues to tax veterans' retirement benefits while exempting its own retirees' benefits. Many more appeals filed by Petitioners and other veterans are now pending before the Appellate Tax Board. Those appeals are presumably controlled by the prior decisions of the Board and the lower court; and once judgments are entered in those appeals, review could be sought from this Court.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition and the Reply Brief, petitioners request that their application for a writ of certiorari be granted or, in the alternative, that the decision below be summarily reversed.

Respectfully submitted,
John E. Filios et al.
By their attorneys,

STEPHEN S. OSTRACH
(Counsel of Record)
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(617) 695-3660

DATED: Boston, Massachusetts: March 12, 1994.